S E C R E T.

C.P. 44 (33).

COPY NO. 30

C A B I N E T.

REPORT OF THE COMMITTEE ON MINISTERS' POWERS.

(Cmd. 4060.)

Note by the Lord Chancellor.

I venture to circulate the attached Memorandum, which was written last year.

(Intld.) S.

House of Lords,
February 21st, 1933.

MEMORANDUM BY THE LORD CHANCELLOR

on the

Report of the Committee on Ministers' Powers.

Some time ago Lord Hewart published a book entitled "The New Despotism". As might be expected coming from him, it was cleverly written, but it was biassed and, in certain respects, ill-informed and wrong.

After a good deal of pressure, I appointed the Donoughmore Committee to go into the matter, and they held a great number of meetings. The members were nearly all experts, and when Donoughmore's health unfortunately forced him to retire from the chairmanship, Leslie Scott finished the enquiry and produced the report. Stripped of a good deal of verbiage, the object of the enquiry was to see how a constitutional democracy can be safely and efficiently worked.

On the legislative side. Having regard to the great amount of social legislation nowadays and its

intricate character, it is impossible for Parliament to deal fully and accurately with details. A great deal of legislation must not only necessarily be done, but is better done, by delegation, though the risks of this are obvious and safeguards have to be provided. The real value of the Report is that it makes a number of practical recommendations about the necessary safeguards. These involve (a) reserving the supremacy of Parliament, and (b) respecting the liberty of the subject. I am far from saying that I agree with all the recommendations, but they will have to be carefully considered. So much for the legislative side.

On the judicial side. It must be recognised, and the Committee have recognised, that the creation of specialised tribunals is necessarily incidental to much modern legislation. Generally speaking, our courts have hitherto had to deal with cases between individuals and/or companies and corporations, but the

result of modern legislation is that many questions have to be decided which, although they do not concern single individuals, concern classes of individuals which are more appropriately dealt with administratively than by the ordinary procedure of a court of law. Here again, however, it is necessary to provide safeguards to protect the subject (a) in regard to Delegated Legislation, against the subordinate authority exceeding the powers conferred by Parliament; (b) in regard to quasi-judicial or administrative decisions, to keep the Ministers or Tribunals within their authorised limits, and (c) to preserve the rights of appeal on questions of law. The Committee have expressed their opinion on these heads, and I again guard myself by saying that although I am not in agreement with all of them, they will have to be carefully considered.

In dealing with these quasi-judicial decisions, the Committee have, however, in my opinion, been careful not to fetter the administration unduly, but their Report does discuss the principles to be observed and provides certain defined safeguards. So much for the judicial side.

On both branches of the enquiry, the Report preserves the jurisdiction of the King's Bench, and suggests simplification in legal procedure. It attaches great value to publicity, and adds that in cases of delegated jurisdiction the practice of discussing round a table the proposed legislation with the interests affected is highly desirable. It suggests a particular safeguard as to delegated jurisdiction by the modification of Standing Orders of the Houses of Parliament, and that a Committee of each House should examine all delegated jurisdiction and see that it is within the ambit of the Statute, and it further recommends that to every bill which creates such delegated jurisdiction the Ministers should attach a memorandum drawing attention to the provisions.

The above is necessarily a very short and concise summary of the Report. We shall, I think, be compelled to make up our minds how to deal with it, for I foresee that it may create considerable difficulties for many Departments, especially that of Local Government. In my view, however, it would be impossible to rush the matter and to come to decisions which we might subsequently regret. I strongly urge that nothing should be done this side of the Long Vacation. During the Vacation many Ministers will be away, and it will not be feasible to do anything. I hope, however, that on our return in October or November a Cabinet Committee will be appointed to consider the Report and advise the Cabinet on its recommendations. I need hardly say that the matter is one of great importance for the future constitutional development of our present political system, and it involves a careful consideration of many difficult legal and political questions.

(Signed) S.

30.5.32.

COMMITTEE ON MINISTERS' POWERS

REPORT

Presented by the Lord High Chancellor to Parliament by Command of His Majesty April, 1932

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COMMITTEE ON MINISTERS' POWERS.

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COMMITTEE ON MINISTERS' POWERS.

MINUTES OF APPOINTMENT.

I.

I, John Lord Sankey, Lord High Chancellor of Great Britain, after consultation with the Prime Minister and the Chancellor of the Exchequer (acting Prime Minister) hereby appoint the following

The Right Hon. The Earl of Donoughmore, K.P. (Chairman),
The Right Hon. Sir John Anderson, G.C.B.,
The Duchess of Atholl, D.B.E., M.P.,
The Rev. James Barr, M.P.,
Dr. E. L. Burgin, M.P.,
The Earl of Clarendon,
Sir Warren Fisher, G.C.B., G.C.V.O.,
Sir Roger Gregory,
Sir William S. Holdsworth, K.C.,
The Right Hon. Sir W. Ellis Hume-Williams, Bart., K.B.E., K.C.,
H. J. Laski, Esq.,
Robert Richards, Esq., M.P.,
Sir Claud Schuster, G.C.B., C.V.O., K.C.,
The Right Hon. Sir Leslie Scott, K.C.,
Gavin Simonds, Esq., K.C.,
Miss Ellen Wilkinson, M.P.,
Sir John J. Withers, C.B.E., M.P.,

to be a Committee to consider the powers exercised by or under the direction of (or by persons or bodies appointed specially by) Ministers of the Crown by way of (*a*) delegated legislation and (*b*) judicial or quasi-judicial decision, and to report what safeguards are desirable or necessary to secure the constitutional principles of the sovereignty of Parliament and the supremacy of the Law.

Dated the 30th day of October, 1929.

SANKEY, *C.*

II.

I, John Lord Sankey, Lord High Chancellor of Great Britain, hereby appoint The Right Honourable The Viscount Bridgeman to be a member of the Committee appointed by me on the 30th October, 1929.

Dated the 7th November, 1929.

SANKEY, *C.*

III.

I, John Lord Sankey, Lord High Chancellor of Great Britain, hereby appoint The Countess of Iveagh, C.B.E., M.P., to be a member of the Committee appointed by me on the 30th October, 1929, in the place of The Duchess of Atholl, D.B.E., M.P., who has resigned.

Dated the 14th January, 1930.

SANKEY, *C.*

IV.

Whereas The Right Honourable The Earl of Donoughmore, K.P., has resigned the Chairmanship of the Committee appointed by me on the 30th day of October, 1929 :

Now, Therefore, I, John Lord Sankey, Lord High Chancellor of Great Britain, hereby appoint The Right Honourable Sir Leslie Scott, K.C., to be Chairman of the said Committee.

Dated the 2nd day of May, 1931.

SANKEY, *C.*

Committee on Ministers' Powers.

To the Rt. Hon. VISCOUNT SANKEY, G.B.E.,
Lord High Chancellor of Great Britain.

REPORT.

SECTION I.—INTRODUCTORY.

Appointment, &c.

Terms of reference.

1. We were appointed by your Lordship's minutes of the 30th October, 1929, and 7th November, 1929, to consider the powers exercised by or under the direction of (or by persons or bodies appointed specially by) Ministers of the Crown by way of (*a*) delegated legislation and (*b*) judicial or quasi-judicial decision, and to report what safeguards are desirable or necessary to secure the constitutional principles of the sovereignty of Parliament and the supremacy of the Law.

Personnel of Committee.

Of the original members of the Committee, the Earl of Clarendon resigned on his appointment as Governor-General of the Union of South Africa, the Duchess of Atholl, the Rev. James Barr, and the Countess of Iveagh, who was appointed an additional member on the 14th January, 1930, resigned on account of pressure of other work. In April, 1931, the Earl of Donoughmore unfortunately found it necessary for reasons of health to resign the Chairmanship, though retaining his membership. Sir Leslie Scott was appointed Chairman on 2nd May, 1931.

Preliminaries.

Literature on our subject.

2. There is a considerable body of literature on the subject matter of our enquiry. We have given particular attention to the following published books and articles :—

C. K. Allen : Law in the Making (Oxford University Press, 1927).

C. T. Carr : Delegated Legislation (Cambridge University Press, 1921).

Prof. A. V. Dicey : The Development of Administrative Law in England (Law Quarterly Review, 1915, Vol. XXXI, page 148).

Prof. John Dickinson : Administrative Justice and the Supremacy of the Law in the United States (Harvard University Press, 1927).

Rt. Hon. Lord Hewart of Bury : The New Despotism (Benn, 1929).

Sir Courtenay Ilbert : Legislative Methods and Forms (Clarendon Press, 1901, out of print.)

Prof. E. W. Patterson : The Insurance Commissioner in the United States (Harvard University Press, 1927).

F. J. Port : Administrative Law (Longmans, 1929).

W. A. Robson : Justice and Administrative Law (Macmillan, 1928).

Main lines of criticism.

It was early evident to us that criticism was directed chiefly to three main points :—

(*a*) Statutory powers conferred on Ministers to make regulations, rules or orders which, when made, might be held to have been placed outside the purview of the Courts by virtue of a provision in the enabling Act supposed to have that effect.

(*b*) Statutory powers so conferred to amend existing Acts of Parliament or even the enabling Act itself in order " to remove difficulties " or to bring the provisions of the Act into operation.

(*c*) Statutory powers of judicial or quasi-judicial decision against which there is no appeal.

Departmental memoranda.

Accordingly we asked all Departments to send us (i) an exhaustive list of all powers of the kind indicated under (*a*), (*b*) and (*c*); (ii) examples of the various types of regulation, rule or order making power, selected by reference not to the subject matter, but to the form and procedure prescribed, and to the safeguards applicable; (iii) examples of types of judicial or quasi-judicial decisions which *are* subject to appeal.

Statements of fact only were asked for and not expressions of opinion.

The Departments went to much trouble in complying with our request and we are greatly indebted to them. These Departmental memoranda which contain much valuable information will be found in the first of the companion volumes to our Report.

Evidence.

Departmental witnesses.

3. At a later stage we supplemented these Departmental memoranda with written and oral evidence from officials of the Ministry of Health, the Ministry of Transport and the Board of Trade. It was clearly unnecessary to take oral evidence from all Departments, and we selected these three because of the great extent of the powers of the Ministers in charge, and of the large number of points at which those Departments are in touch with the public. We also heard the following official witnesses :—

Sir Maurice Gwyer, K.C.B., K.C., H.M. Procurator General and Treasury Solicitor,

Sir William Graham Harrison, K.C.B., K.C., First Parliamentary Counsel,
Mr. C. T. Carr, LL.D. (Editor of Statutes Revised, Statutory Rules and Orders, etc., and author of the book above-mentioned),

Other witnesses.

and we received written or oral evidence from the following persons or organisations :—

(1) Sir Dennis Herbert, K.B.E., M.P.,
Mr. W. A. Robson (Barrister at Law and Lecturer in Industrial and Administrative Law at the London School of Economics and Political Science),
The late Earl Russell,
Mr. Joshua Scholefield, K.C.

(2) Association of British Chambers of Commerce,[1]
Association of Municipal Corporations,
County Councils Association,
Dock and Harbour Authorities Association,
Federation of British Industries,
General Council of the Bar,
Land Union,
Law Society,
National Chamber of Trade,
National Federation of Property Owners and Rate-payers,
Open Door Council,
Property Owners' Protection Association,
Shipowners' Parliamentary Committee,
Surveyors' Institution.

We invited the Lord Chief Justice, the author of "The New Despotism," to give evidence, but he replied that as we had read his book and he had at present nothing to add to it, he did not think he could be of further assistance to the Committee.

The evidence was heard in public and is printed in the second of the companion volumes to this report. A few of the witnesses did not wish to supplement their written memoranda with oral evidence, but in these as in the other cases the written memoranda have been treated as the evidence-in-chief. In all we held 54 meetings at 22 of which oral evidence was taken.

We have embodied in the evidence volume of our proceedings only such of the statements received by us as seemed to bear directly on the subject matter of our enquiry.

We desire to express our thanks to all those who furnished statements and memoranda, as well as to the witnesses mentioned above, for the trouble taken on our behalf.

[1] The London Chamber of Commerce agreed with this evidence.

We have not regarded it as within our functions to review decisions in particular cases by or on behalf of Ministers of the Crown which are, or have been, the subject of dispute or complaint.

Thinking that on some points some of the official witnesses might feel difficulty in expressing their personal views in public, we intimated that we were ready to hear them in private on any such points. But in no case did any official avail himself of this offer. All our evidence was taken in public.

Division of Enquiry.

4. Our report follows the natural division of our subject into two separate parts, (*a*) delegated legislation, (*b*) judicial or quasi-judicial decision. The first is dealt with in Section II and the second in Section III.

General Considerations.

Separation of powers is real but not rigid.

5. There are a few general considerations to be stated. In the British Constitution there is no such thing as the absolute separation of legislative, executive, and judicial powers; in practice it is inevitable that they should overlap. In such constitutions as those of France and the United States of America, attempts to keep them rigidly apart have been made, but have proved unsuccessful. The distinction is none the less real, and for our purposes important. One of the main problems of a modern democratic state is how to preserve the distinction, whilst avoiding too rigid an insistence on it, in the wide borderland where it is convenient to entrust minor legislative and judicial functions to executive authorities.

Delegation not confined to Ministers.

It is customary to-day for Parliament to delegate minor legislative powers to subordinate authorities and bodies. Ministers of the Crown are the chief repositories of such powers; but they are conferred also, in differing degrees, upon Local Authorities, statutory corporations and companies, Universities, and representative bodies of solicitors, doctors and other professions. Some people hold the view that this practice of delegating legislative powers is unwise, and might be dispensed with altogether. A similar view is held with regard to the delegation to Ministers by statutory authority of judicial and quasi-judicial functions. It has even been suggested that the practice of passing such legislation is wholly bad, and should be forthwith abandoned. We do not think that this is the considered view of most of those who have investigated the problem, but many of them would like the practice curtailed as much as possible. It may be convenient if on the threshold of our report we state our general conclusion on the whole matter. We do not agree with those critics who think that the practice is wholly bad. We see in it definite advantages, provided that the statutory powers are exercised and the statutory functions performed in the

General Conclusions.

right way. But risks of abuse are incidental to it, and we believe that safeguards are required, if the country is to continue to enjoy the advantages of the practice without suffering from its inherent dangers.

Delegation inevitable.

But in truth whether good or bad the development of the practice is inevitable. It is a natural reflection, in the sphere of constitutional law, of changes in our ideas of government which have resulted from changes in political, social and economic ideas, and of changes in the circumstances of our lives which have resulted from scientific discoveries. In this connection we call attention to the following passage in the Report (June, 1931) of the Committee on Finance and Industry :—[2]

> " The most distinctive indication of the change of outlook of the government of this country in recent years has been its growing preoccupation, irrespective of party, with the management of the life of the people. A study of the Statute Book will show how profoundly the conception of the function of government has altered. Parliament finds itself increasingly engaged in legislation which has for its conscious aim the regulation of the day-to-day affairs of the community, and now intervenes in matters formerly thought to be entirely outside its scope. This new orientation has its dangers as well as its merits. Between liberty and government there is an age-long conflict. It is of vital importance that the new policy, while truly promoting liberty by securing better conditions of life for the people of this country, should not, in its zeal for interference, deprive them of their initiative and independence which are the nation's most valuable assets."

In this passage, Lord Macmillan's Committee calls attention to the principal danger inherent in this new policy. We are concerned rather with the danger incidental to the particular method by which the new policy is carried out, namely, the practice of entrusting legislative and judicial functions to the Executive.

Legislative Powers in the hands of the Executive.

It is, as Professor Dicey pointed out in " The Law of The Constitution," [3] futile for Parliament to endeavour to work out the details of large legislative changes. Such an endeavour only results in cumbersome and prolix statutes, and the evil is so apparent that in modern times Acts of Parliament constantly contain provisions empowering the Privy Council, or one of the Ministers of the Crown, to make regulations under the Act for the determination of details which cannot be settled by Parliament.[4]

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[2] Cmd. 3897 of 1931. Part I, Chapter I, paragraph 8, pp. 4 and 5.

[3] 8th Edition (1915), p. 50.

[4] John Stuart Mill in 1861 in his " Representative Government " (chap. 5, p. 235 of Everyman's Library edition), went so far as to assert " But it is equally true, though only of late and slowly beginning to be acknowledged, that a numerous Assembly is as little fitted for the direct business of legislation as for that of administration."

Yet the practice, useful and necessary as it is, does to some extent entail an abandonment by Parliament of its legislative functions. The details which are left to be determined by the Privy Council[5] or a Minister may closely affect the rights and property of the subject, and even personal liberty. There is at present no effective machinery for Parliamentary control over the many regulations of a legislative character which are made every year by Ministers in pursuance of their statutory powers, and the consequence is that much of the most important legislation is not really considered and approved by Parliament. This may or may not make for efficiency; but its extent is plainly an innovation in constitutional practice.

Judicial Powers in the hands of the Executive.

Experience has also shewn that in the course of delegating these very wide powers to Ministers Parliament often entrusts them or persons appointed by them with the right and duty to take decisions, which determine the rights of private persons and deprive them of their access to the Courts of Law. It cannot, we think, be denied that *primâ facie* this involves an infringement of that rule of law which is "a characteristic of the English Constitution."[6] In this context we may quote a statement of the ideal of justice which should always be an aim of British statesmanship:—

The ideal of justice.

> "Amid the cross-currents and shifting sands of public life the Law is like a great rock upon which a man may set his feet and be safe, while the inevitable inequalities of private life are not so dangerous in a country where every citizen knows that in the Law Courts, at any rate, he can get justice."[7]

We do not doubt that in the exercise of the judicial and quasi-judicial powers of Ministers justice is as a general rule substantially done; but it should always be remembered that justice is not enough. What people want is security for justice, and the only security for justice is Law, publicly administered.

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[5] Powers given to His Majesty to be exercised by Order in Council are exercised by the King at a meeting of His Privy Council. The King holds such meetings from time to time. Summonses are sent out by the Lord President of the Council to a few Privy Councillors. The rule of practice requires the presence of three, and the Clerk of the Council must attend to attest the document. The Order is expressed to be made by His Majesty by and with the advice of His Council and is signed by the Clerk of the Council; see The Constitutional History of England by F. W. Maitland (1909), p. 406.

[6] The Law of The Constitution: by A. V. Dicey, 8th Ed. (1915), p. 183.

[7] Your Lordship's speech at the Mansion House, July 5th, 1929, as quoted in "The New Despotism," p. 151.

A quotation from the Lord Chief Justice.

Great stress has been laid on this public need by the Lord Chief Justice in " The New Despotism " at pages 48 and 49 :—

> " How is it to be expected that a party against whom a decision has been given in a hole-and-corner fashion, and without any grounds being specified, should believe that he has had justice? Even the party in whose favour a dispute has been decided must, in such circumstances, be tempted to look upon the result as a mere piece of luck. Save in one or two instances, none of the Departments publishes any reports of its proceedings, or the reasons for its decisions, and as the proceedings themselves, if any, are invariably held in secret, even interested parties have no means of acquiring any knowledge of what has taken place, or what course the Department is likely to take in future cases of the same kind that may come before it. A Departmental tribunal is, however, in no way bound, as a Court of Law is, to act in conformity with previous decisions, and this fact is commonly regarded as one of the reasons for the policy of secrecy. Others may think that the Department is afraid to disclose inconsistencies and a want of principle in its decisions. However that may be, the policy is fatal to the placing of any reliance on the impartiality and good faith of the tribunal. It is a queer sort of justice that will not bear the light of publicity."

Necessity for safeguards.

We regard this passage, and indeed the whole of the Lord Chief Justice's book, as a warning against possible dangers of great gravity towards which he discerns an existing tendency to drift. We are very much alive both to the presence of such dangers and to their gravity if not checked, and have considered them throughout our enquiry. But, as appears from our considered view in the next two sections of our Report, we see nothing to justify any lowering of the country's high opinion of its Civil Service or any reflection on its sense of justice, or any ground for a belief that our constitutional machinery is developing in directions which are fundamentally wrong. Our Report draws attention to certain parts of that machinery which are capable of improvement, and certain aspects of its working where specific safeguards are needed. At the same time we say deliberately that there is no ground for public fear, if the right precautions are taken. None the less the public should be grateful for outspoken criticism, even if exaggerated; and we think that the critics whose warnings—and it may be attacks—led up to our investigations performed a useful service.

SECTION II.—DELEGATED LEGISLATION.

Preliminary—The "Separation of Powers."

1. The subject of delegated legislation cannot be fully understood without a knowledge of the constitutional relations between the Legislature and the Executive in England. We therefore begin Section II with some observations upon the principles of our Constitution and its development.

The so-called Separation of Powers in the British Constitution.

It is generally agreed that Montesquieu is the main author of the theory of the separation of powers.[8] There is no doubt that the theory was suggested to him by his interpretation of the mechanism of our Constitution. But his theory, as he stated it, is a very incomplete and to some extent a misleading account of that mechanism; and both in the United States of America and in France it has given rise to constitutional developments which are still further removed from the mechanism and the law of the English Constitution.

In the eighteenth century the fact that the powers of the State were shared between the King, Parliament, and the Courts, and the fact that the powers of the Legislature were shared between the King, the House of Lords and the House of Commons, were the most obvious features of the English Constitution and English constitutional law, and the most obvious contrasts to the despotic and centralised monarchical governments of the Continent.

All through the eighteenth century, this division of powers in the constitution was regarded by statesmen, lawyers and political writers as its leading characteristic[9]. But these men, when they dwelt upon this feature of the English Constitution, were simply describing an obvious phenomenon. Montesquieu gave a new turn to their observations when he elevated them to the rank of a new and a universal constitutional principle, by maintaining that it was to this separation of the powers of government that the English people owed their liberty.

In fact, though there was no doubt a division in the powers of government in the English Constitution, it was by no means a clear-cut division. This is obvious from a very cursory glance at a few elementary facts. In the sphere of central government

[8] The following passage in his "De L'Esprit des Lois," Bk. XI, Chap. VI (Oeuvres Complètes de Montesquieu: Edouard Laboulaye: Paris, 1877: Vol. 4, p. 81), contains the essence of his theory:—

"Lorsque dans la même personne ou dans le même corps de Magistrature la puissance législative est réunie à la puissance exécutrice, il n'y a point de liberté, parce qu'on peut craindre que le même monarque ou le même senat ne fasse des lois tyranniques pour les exécuter tyranniquement. Il n'y a point encore de liberté si la puissance de juger n'est pas separée de la puissance législative et de l'exécutrice."

[9] Some of the authorities for this statement are collected in L.Q.R. XLV 445-6 in an article by Sir William Holdsworth.

the Crown was and still is an essential part of the Legislature; and in the eighteenth century the Crown was able, whenever it wished to do so, both to initiate legislation and to exercise a considerable influence on the contents of Bills pending in the two Houses of Parliament. The House of Lords was and still is a part of the judicial as well as of the legislative machinery of the State. Some of the privileges of the House of Commons gave and still give to it some of the characteristics of a Court of Law. The Courts, by means of the prerogative writs, exercised and still exercise an administrative control, under judicial forms, over all subordinate jurisdictions, amongst which was included in the eighteenth century the whole machinery of local government. In the sphere of local government, the lines between the different functions of government were not merely blurred but disappeared. Quarter and Petty Sessions in town and country alike exercised legislative, executive and judicial functions. Professor Levy-Ullman, in his very able book on *Le Systeme Juridique de l'Angleterre* (1928: Vol. i. p. 376) has very truly said that Montesquieu has drawn his picture of " la brumeuse Angleterre et les Anglais du fond de ses vignes bordelaises, sous le clair soleil de sa Gascogne,"[10] and that " L'Angleterre n'est pas la patrie classique de la séparation des pouvoirs. Chaque pouvoir y a reçu sa physionomie particulière san cesser de conserver les (? des) traits des autres."[11]

It was not so much the separation of powers which was a characteristic feature of the English Constitution, as the fact that the machinery both of local and of central government consisted of officials and bodies possessing a large measure of autonomy. In the sphere of local government, Quarter and Petty Sessions, Borough Corporations, and Poor Law authorities; in the sphere of central government, such Departments of State as the Exchequer and the offices connected with the revenue, the offices connected with the Navy and Army, and the offices of the Secretaries of State—were left to carry out their duties in their own ways, subject only to the legislative control of Parliament and to the control of the law as interpreted by the Courts. Subject to that control, these officials and bodies possessed independent powers of action, and a capacity for development upon their own lines. Blackstone was much nearer than Montesquieu to the truth when he said[12] " herein indeed consists the true excellence of the English government, that all the parts of it form a mutual check upon each other "; and that " in this distinct and separate existence of the

Judicial independence.

[10] " Misty England and the English as he sat beneath his Bordeaux vines, in the bright sunshine of his own Gascony ".

[11] " England is not the classic home of the separation of powers. Each power there has taken on a character peculiarly its own whilst at the same time preserving features of the others ".

[12] Comm. i. 154 (12th Edition).

judicial power in a peculiar body of men, nominated indeed, but not removable at pleasure, by the Crown, consists one main preservative of the public liberty.''[13]

Development of administrative authorities.

The fact that these officials and bodies had this large measure of autonomy enabled them to develop on their own lines under the exigencies of the duties entrusted to them; and in the course and as part of that development they were free to make rules for the discipline of their members and for the better ordering of their business. Thus, the Courts and both Houses of Parliament acquired clerical staffs, and made their own rules of procedure by virtue of their inherent powers, without the need for any statutory authorisation. The departments of the executive government developed in the same way; and many of the units of the local government, in town and country, acquired a more elaborate organisation and assumed new powers without statutory permission.[14]

This power to develop freely on their own lines, and to use freely the administrative powers which they assumed, subject only to the control of Parliament and of the common law, is a phenomenon which is apparent in all parts of the mechanism of the English Constitution—local and central—from a very early period in its history. Nowadays new mechanism is more often created by statute than evolved from a modification and an expansion of old institutions; and the powers needed by the new mechanism thus created are likewise given by statute. But the powers given by modern statutes are often essentially similar to the powers which were assumed by many organs of government at an earlier period. One illustration is the right of the Courts to make rules of procedure. This authority, which was assumed by the Courts in the eighteenth and earlier centuries, now rests upon a statutory basis and is exercised by a Joint Committee of Judges, Barristers and Solicitors known as the Rule Committee.

Early instances of delegation.

As compared with the nineteenth and twentieth centuries, the Legislature, in the eighteenth century, was sparing in the gift of those statutory powers, either of the judicial or of the legislative kind, which are the subject of our enquiry, and in the creation of new organisations. But there are instances in the eighteenth century in which these powers were given (i) to officials, and (ii) to the Crown; and though the extent and the mode of the exercise

[13] *Comm.*, i. 269.

[14] Sidney and Beatrice Webb (now Lord and Lady Passfield) have pointed out in their book on Local Government, vol. i, 480-3, that, in the course of the eighteenth century, Quarter Sessions, though originally a court exercising its powers under judicial forms, had developed executive and legislative in addition to its judicial functions; and that "these developments were extra-legal in character; they were neither initiated by Parliament nor sanctioned by it".

of these powers were sometimes attacked, the attacks failed, because it was realised that powers of this kind were essential to the effective conduct of the government.

(i) *Taxation.*

(i) The Acts relating to the customs and excise gave judicial powers to the Commissioners of Customs and Excise.[15] Blackstone, though he admitted the necessity for these powers, said that in consequence " the power of these officers of the Crown over the property of the people is increased to a very formidable height ";[16] the opinion held of the Commissioners of Excise by the general public is reflected in Johnson's definition of the term " Excise ";[17] and their arbitrary powers were complained of in the House of Commons. In 1786 and 1790 proposals were made in the House of Commons that, in certain proceedings taken by these Commissioners, the defendant should have the option of being tried by a jury;[18] and, in 1789, that, in actions against excise officers for illegal acts, it should not be possible to plead a conviction in bar of the action.[19] But these proposals were rejected because it was realised that the summary procedure by which they exercised their judicial powers was necessary for the efficient collection of the revenue.[20] In 1785 the Commissioners for stamp duties were given power to do acts necessary for putting in force the duties imposed on post horses and carriages,[21] and in certain cases to make regulations for effectually securing the duty on such carriages.[22]

(ii) *Army and Navy.*

(ii) The Mutiny Acts afford an even more striking instance of delegated legislation at an early date. In 1717 there appeared on the Statute Book, in the shape of the Mutiny Act for the year, what Professor Maitland called as good an example of delegated legislative powers as he knew.[23] The first Mutiny Act was passed in 1689[24] and the practice soon became settled of passing such an Act in every year. But the Act of 1717[25] was the first which gave the Crown express authority to make and constitute, under His Sign Manual, Articles for the better government of His Majesty's forces as well *within* the Kingdoms of Great Britain and Ireland as beyond the seas and inflicting pains and penalties to be proceeded upon

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[15] 12 Charles II, c. 24, s. 45; 1 Geo. II, St. 2, c. 16, ss. 4 and 5.
[16] Comm. IV, 281.
[17] " A hateful tax levied upon commodities, and adjudged not by the common Judges of property, but wretches hired by those to whom Excise is paid ".
[18] Parlt. Hist. xxvi, 117-120; xxviii, 231-2, 748-9.
[19] *Ibid.*, xxviii, 231-242.
[20] Parlt. Hist. xxvi, 132; xxviii, 241, 754.
[21] 25 Geo. III, c. 51, s. 5.
[22] *Ibid.*, s. 51.
[23] The Constitutional History of England, by F. W. Maitland (1909), p. 449.
[24] I. Will. and Mary, c. 5.
[25] 3 Geo. I, c. 2.

to sentence or judgment in Courts Martial to be constituted pursuant to the Act. This became a standing clause in the Act[26] and formed a subject of Parliamentary controversy on the ground that it vested in the Crown the sole legislative power over the Army. In 1749 the controversy was settled by the insertion of the words: "Provided always that no person or persons shall be adjudged to suffer any punishment extending to life or limb by the said Articles of War within the Kingdom of Great Britain and Ireland except for such crimes as are expressed to be punishable by the Act".[27] The clause as further modified is still to be found on the Statute Book in the shape of Section 69 of the Army Act[28] which now applies to the Air Force as well as to the Army.[29]

In the case of the Navy, on the other hand, the Articles of War have been specifically enacted by Parliament ever since 1661[30] and are now contained in the Naval Discipline Act.[31] The contrast afforded by the respective Navy and Army methods is striking in two ways. It shows how the practice of delegated legislation has grown up without any preconceived plan or logical system: and also that Parliament may delegate in one case while not delegating in another without any obvious reason for differentiating between the two. In this particular case the probable explanation of the difference between the methods is that Parliament regarded the Navy as a permanent institution and therefore took the trouble to make a code, whereas it regarded the Army as a temporary evil and therefore left matters to be regulated by the Crown during the short period for which Parliament licensed a Standing Army.

Control by the Courts and its limitations.

The exercise of these powers was subject to the control of the Courts, the intervention of which could be invoked, if the persons or bodies to whom they were entrusted exceeded the authority conferred upon them by the statute. But the Courts recognised the need not to fetter unduly their autonomy. Thus, in the case of *Sutton* v. *Johnstone*[32] Lords Mansfield and Loughborough gave it as their opinion that one member of the Navy had no right of action against another, for malicious prosecution before a Court Martial, even if the plaintiff could prove malice and the absence of reasonable and probable cause for the prosecution.[33]

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[26] In a slightly stiffened form:—"and to erect and constitute Courts Martial with power to try hear and determine any crimes or offences by such Articles of War and inflict penalties by sentence or judgment of the same."

[27] 22 Geo. II, c. 5, s. 57.

[28] 44 & 45 Vict., c. 58.

[29] 7 & 8 Geo. V, c. 51, s. 12.

[30] 13 Charles II, c. 9.

[31] 29 & 30 Vict., c. 109.

[32] (1786) 1 T.R., 493.

[33] See also as to Custom House officers 26 George III, c. 59, s. 57, and the case of Cooper v. Cameron (1785) Burn, Justice of the Peace (23rd ed. 1820), ii. 105-7.

But it should be observed that the ambit of the powers of these older officials and bodies was determined by the common law, and that the powers given to the newer statutory bodies were fixed by the statute. They had no power to vary the common law or the statute; and the Courts could always interfere if the limits defined by the common law or statute were overstepped. The chief if not the only clear instances in which, before the nineteenth century, Parliament seems to have given a power of delegated legislation in such general terms that it was in effect unlimited, or so vaguely limited, that the control of the Courts over its exercise was either wholly or partially ousted,[34] are first an enactment concerning the Staple made in 1385,[35] secondly Henry VIII's Statute of Sewers, 1531,[36] thirdly Henry VIII's Statute of Proclamations, 1539,[37] fourthly Section 59 of Henry VIII's Statute of Wales (1542-3),[38] and fifthly two Statutes of 1536 and 1547.[39]

With regard to these statutes the following facts must be borne in mind. The enactment concerning the Staple was passed at a time when the legislative procedure of Parliament was not fixed in its final form, and when the King was still regarded as playing the most important part in the enactment of statutes. It was not till the beginning of the fifteenth century that the Commons expressly claimed to be both assentors to as well as petitioners for legislation.[40] The Statute of Sewers gives to the Commissioners of Sewers not only legislative powers, but also powers to rate landowners, and to distrain and to impose penalties for non-payment of rates. These powers are given to them by the Commission which is set out in Section 2 of the Act. The Act then goes on to provide in Sections 6 and 7 that all Statutes, Acts and Ordinances heretofore made by Commissioners of Sewers " not being contrary to this present Act nor heretofore repealed " are to " be good and effectual for ever," and that Commissioners hereafter to be named " have full power and authority to make constitute and ordain laws, ordinances and decrees, and further to do all and

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[34] In such cases, if the power given is unlimited, the Courts cannot say that any exercise of the power is beyond the competence of the person or body to whom the power to legislate has been delegated; while if the power is only vaguely limited it is difficult for the Courts to do this. We discuss such provisions further in paragraph 8.

[35] " Quod Stapula teneatur in Anglia; sed in quibus erit locis, et quando incipiet, ac de modo et forma regiminis et gubernationis ejusdem, ordinabitur postmodum per consilium domini regis, auctoritate parliamenti: et quod id quod per dictum consilium in hac parte fuerit ordinatum, virtutem parliamenti habeat et vigorem." It is not to be found in the statutes, but in the Rolls of Parliament III 204; it is cited by Stubbs, Constit. Hist. (Library Ed.), ii. 641 n.1.

[36] 23 Henry VIII, c. 5.

[37] 31 Henry VIII, c. 8.

[38] 34 and 35 Henry VIII, c. 26.

[39] 28 Henry VIII, c. 17 and 1 Edward VI, c. 11.

[40] Rot. Parl. IV, 22, 2 Henry V, No. 22.

everything mentioned in the said Commission . . . and the same laws and ordinances so made, to reform repeal and amend, and make new from time to time as the cases necessary shall require in that behalf." The statute thus delegates to the Commissioners legislative powers, taxing powers and judicial powers. Moreover it anticipates in another form the modern device of requiring a further sanction for Acts and Ordinances which are to have a permanent legislative effect. Sections 16 and 17 provide that the Acts and Ordinances of the Commissioners are to have effect only for the duration of the Commission[41] unless they are certified into the Chancery and receive the royal assent. Henry VIII's Statute of Proclamations enacted that the King with the advice of His Council could issue proclamations which should have the force of an Act of Parliament.[42] But this Statute (which had a very short life)[43] especially provided that the common law, statute law, and rights of property could not be affected by proclamations issued by virtue of the Act. Section 59 of the Statute of Wales goes a great deal further, since it gives the King power to make laws for Wales which " shalbe of as good strengthe vertue and effecte as if they had been hadde and made by authoritie of Parliament." It was repealed in 1624.[44] Probably it was meant to be a temporary power given to facilitate the introduction of English institutions into Wales.

The statutes of 1536 and 1547, which were repealed[45] in 1751, authorised the successors of Henry VIII and Edward VI, if they succeeded to the throne while still under age, to repeal by letters patent, on attaining the age of 24, Acts of Parliament passed between their accession to the throne and their attainment of that age. Such a power is, according to our modern ideas, a power of delegated legislation. But it was not so regarded in the sixteenth century. It was regarded as an ordinary application of the medieval doctrine that an infant's position ought not to be prejudiced by acts done during his minority. It is essentially the same idea which led Henry III to insist, when he attained full age, that " all charters granted in his name during his minority required confirmation, even the Great Charter and the Forest

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[41] The duration under the Statute was three years unless sooner determined by the King. For the Commission's later history see the Webbs' book on Local Government, Statutory Authorities, Chap. I, pp. 13-106.

[42] 31 Henry VIII, c. 8, s. 1.

[43] It was repealed in 1547, 1 Edward VI, c. 12, s. 4.

[44] 21 Jac. I, c. 10.

[45] By 24 Geo. II, c. 24, s. 23.
(The statute of 1547 had already repealed the statute of 1536 and replaced it. The repeal of the statute of 1547 would in 1751 or at any time before 1850, when the law on the point was altered by statute, have *ipso facto* revived the statute of 1536 if Parliament had not simultaneously repealed the statute of 1536 for the second time.)

Charter";[46] and since the same idea reappears in Henry VI's reign,[47] it is not surprising that it should have emerged again in the sixteenth century.

Comparison with the Tudor period.

It will be observed that, with the exception of the Statute of the Staple, all these instances come from the Tudor period—a period, like the nineteenth and twentieth centuries, when great political, social and economic changes were taking place. We think that the appearance of statutes which delegate large legislative powers at both these periods is more than a coincidence, and that it confirms our conclusion that the delegation of legislative powers is at the present day inevitable. Similar needs have given rise at these two very different periods to a similar expedient.

What delegated legislation is.

2. The word "legislation" has grammatically two meanings—the operation or function of legislating: and the laws which result therefrom. So too "delegated legislation" may mean either exercise by a subordinate authority, such as a Minister, of the legislative power delegated to him by Parliament; or the subsidiary laws themselves, passed by Ministers in the shape of Departmental regulations and other statutory rules and orders. In our terms of reference the phrase is used in the former sense; we are asked to report on the activity or function: and we have to consider whether it is good or bad, avoidable or unavoidable, what limitations, if any, can or should be put upon it, what safeguards should be attached to its exercise. But obviously judgment of the function must be guided by investigation of results in past and present constitutional practice; and it has therefore been a part of our task to examine our national output of subsidiary laws. That output has been and is vast. Mr. Carr, the official Editor of "Statutory Rules and Orders," in his book on Delegated Legislation describes the position so happily that we cannot do better than quote him:—

The great volume of delegated legislation.

> "Blackstone gave currency to the artificial division of English law into *lex scripta* and *lex non scripta*. With the latter we are not now concerned. The former—the written law—has been again divided into three parts. The first and now far the smallest part is made by the Crown under what survives of the prerogative. The second and weightiest part is made by the King in Parliament and consists of what we call Acts of Parliament. The third and bulkiest part is made by

[46] Pollock and Maitland Hist. Eng. Law (1st Ed.), i. 507.
[47] Holdsworth Hist. Eng. Law (1st Ed.), iii. 464.

such persons or bodies as the King in Parliament entrusts with legislative power. It is with this last part that these pages will deal. It is directly related to Acts of Parliament, related as child to parent, a growing child called upon to relieve the parent of the strain of overwork, and capable of attending to minor matters while the parent manages the main business.

"In mere bulk the child now dwarfs the parent. Last year, while 82 Acts of Parliament were placed on the Statute Book, more than ten times as many 'statutory rules and orders' of a public character were officially registered under the Rules Publication Act. The annual volume of public general statutes for 1920 occupied less than 600 pages; the two volumes of statutory rules and orders for the same period occupy above five times as many. This excess in mere point of bulk of delegated legislation over direct legislation has been visible for nearly thirty years."[48]

The absence of system.

Delegated legislation takes many forms. With the haphazard habit characteristic of English political life the constitutional practice has grown up gradually, as and when the need arose in Parliament, without any logical system. The power has been delegated by Parliament for various reasons, because, for instance, the topic involved much detail, or because it was technical, or because the pressure of other demands upon Parliamentary time did not allow the necessary time to be devoted by the House of Commons to the particular Bill. The limits of delegated power, the methods of Ministerial procedure, and the safeguards for the protection of the public or the preservation of Parliamentary control thus appear often to have been dictated by opportunist considerations, peculiar to the occasion.

The confusion of nomenclature.

As a natural consequence the choice of terminology has also been accidental; and the nomenclature of delegated legislation is confused. The Act of Parliament which delegates the power may in so many words lay down that "regulations," "rules," "orders," "warrants," "minutes," "schemes," "bye-laws," or other instruments—for delegated legislation appears under all these different names—may be "made" or "approved" under defined

[48] "Delegated Legislation," p. 2. This was written in 1921. In his evidence (Memorandum, 15th Day), to your Lordship's Committee, Mr. Carr gives the annual totals of statutory rules and orders from 1894 to 1929, and says "it is significant, and perhaps surprising, that the tide has now ebbed back to a pre-war mark."

conditions.[49] On the other hand the statute may merely authorise the Minister to " prescribe " or " approve " certain requirements, or to " appoint " a day, or " fix " some standard, but give no directions about the particular method or form to be adopted in framing his decision; he may even be left free to perform his prescribing, approving, appointing, or fixing by an *ad hoc* decision—perhaps even informally in the course of correspondence—without any obligation to formulate it in general terms as a legislative regulation.[50]

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[49] Well known modern examples are:—

(1) The Defence of the Realm (Consolidation) *Regulations*, 1914, made by His Majesty in Council under the Defence of the Realm (Consolidation) Act, 1914 (5 & 6 Geo. 5, c. 8).

(2) The *Rules* of the Supreme Court, which are made by the Rule Committee, and now derive their authority from the Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49).

(3) The Public Assistance *Order*, 1930, made by the Minister of Health under the Poor Law Act, 1930 (20 & 21 Geo. 5, c. 17).

(4) The Imperial and Foreign Post *Warrant*, 1930, made by the Treasury on the representation of the Postmaster General under the Post Office Acts, 1908 to 1920 (8 Edw. 7, c. 48; 5 & 6 Geo. 5, c. 82; 10 & 11 Geo. 5, c. 40).

(5) *Minute* (entitled the Education Authorities (Scotland) Grant Regulations, 1930) made by the Scottish Education Department under Section 21 of the Education (Scotland) Act, 1918 (8 & 9 Geo. 5, c. 48).

(6) *Scheme* dated May 2nd, 1930, made by the Board of Education with the consent of the Treasury under the Teachers (Superannuation) Act, 1925 (15 & 16 Geo. 5, c. 59), relating to teachers in the employment of the Air Council.

(7) *Bye-Laws and Regulations* made by the London Midland and Scottish Railway Company under the Railway Clauses Consolidation Act, 1845 (8 & 9 Vict., c. 20), with the approval of the Minister of Transport under the Railway Regulation Act, 1840 (3 & 4 Vict., c. 97), for regulating the travelling upon and using and working of and for maintaining order in and upon the Company's railways.

[50] e.g., (i) Under sub-section (1) of Section 32 of the Housing Act, 1925 (15 Geo. 5, c. 14), every charge created by a charging order under Part I of that Act must be in such form as the Minister of Health may *prescribe*.

(ii) Under sub-section (3) of Section 60 of that Act the Minister of Health may *approve* a scheme submitted to him by a Local Authority for the exercise of their powers under Part III of the Act.

(iii) Under sub-section (1) of Section 172 of the Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40), the Commissioners of Inland Revenue may *appoint* a day on or before which a collector shall pay over, or account for, the tax and moneys given him in charge to collect.

(iv) Under Rule 10 of Schedule E of that Act, the Treasury may *fix* such sum as in their opinion represents a fair equivalent of the average annual amount laid out and expended in the performance of their duties by any class of persons in receipt of any salary, fees or emoluments payable out of the public revenue; and the sum so fixed is deducted for tax.

Nomenclature: suggestions for simplification.

Although Parliament has thus used a bewildering miscellany of names for the same political function, we have thought it convenient in this Report to use the one word " regulations " to describe the subordinate legislation which results from delegation, whatever form it may take, or however many names it may in fact have received hitherto. It would obviously be desirable that Parliament also should for the future endeavour to call the same thing by the same name. Our Constitution is, under the influence of modern views of the functions of the State, becoming inevitably more complex, and new constitutional ideas are all the time being evolved. For that very reason careful choice of words is important.

But the confusion of names is not only due to the use of many different words for the same thing. It is aggravated by the use of the same word for different things. The word " order " is used for an executive act, for a judicial act, and for a legislative act, and in the last use means the same as a regulation or law. But the word is also used for prerogative legislation in those special spheres where that prerogative survives, in the form of " Orders in Council." It is used too in the phrase " provisional order," which until confirmed by Act of Parliament is not an " order " at all. Further confusion is caused by the use of the term " special orders " in several differing senses as explained in paragraph 6 at page 27 below; and the draftsman's art achieves its final success in the phrase " provisional special order."

The commonest words in statutory use to describe delegated legislation are " regulations," " rules," and " order." But considerable confusion is caused by their indiscriminate use. No attempt seems to have been made at any definition and delimitation of the words. The word " regulations " naturally implies legislative matter of general application; the word " rules " is apposite to procedure; and the word " order " is more appropriate to either an executive or a judicial or semi-judicial decision. But these distinctions of meaning are ignored and no statutory definition has been substituted. Under many Acts, e.g., the Poor Law Acts and Housing Acts, the Minister of Health makes " orders " of a general character (e.g., the Public Assistance Order, 1930,[51] which superseded the General Poor Law Order of 1847) which are truly in the nature of " regulations " whilst many " rules " are not confined to matters of procedure.

No doubt the use of the phrase " Orders in Council "[52] has become sanctioned by long tradition and presents a difficulty in the way of an exclusive use of another word to describe delegated legislation. But we call attention to the point here for the sake

[51] S.R. & O., 1930, No. 185, p. 1405.

[52] For the difference between prerogative and statutory Orders in Council, see para. 5 below. We refer here, of course, to statutory Orders in Council only.

of emphasising the difficulty of the subject due to confusion of language; we revert to the question in our recommendations.

Many regulations not legislative.

But further confusion is sometimes caused by difficulties inherent in the subject matter. Whilst any Ministerial activity which is legislative in substance is necessarily within the phrase " delegated legislation," that expression is not in a practical sense appropriate to all the regulations, rules and orders which are issued by a Minister, nor even to all those which are so made pursuant to express authority in some Act of Parliament. Many regulations, rules and orders, even some which are legislative in form, are in truth mere machinery of administration, or the exercise of a purely executive function, amounting to little more than a statement of practice, which the Minister publishes for the guidance of his own officers, or for the convenience of the public, in connection with some Act of Parliament for the administration of which he is responsible. Such action often might equally well be expressed in a circular letter to those concerned.

Difficulty of rigid distinctions.

It is indeed difficult in theory and impossible in practice to draw a precise dividing line between the legislative on the one hand and the purely administrative on the other; administrative action so often partakes of both legislative and executive characteristics. The true nature of statutory provisions and of regulations made thereunder is not infrequently still further complicated by the addition of a quasi-judicial aspect; regulations in which this aspect appears will be dealt with in Section III as well as in this Section of our Report.

This complication is not peculiar to the British Constitution but inherent in modern democracy. It has been much considered in the United States.[53]

But just because legislative and administrative functions overlap, it is dangerous to allow oneself to be guided too much by the name. No doubt a large proportion of the regulations made by Ministers under statutory authority are intimately concerned with administration, and often constitute, wholly or mainly, codes of mere executive orders. And yet to take any set of regulations and conclude that, because they are primarily " administrative," they can be disregarded as having no legislative aspect may often be wrong. Indeed to exclude " administrative " regulations from any system of safeguards to be adopted in regard to delegated legislation would be dangerous; for to do so might let in the very evils against which safeguards are designed. Executive discretion, uncontrolled by safeguards, may easily become a cloak for those very powers of arbitrary legislation or judicial decision feared by those critics who describe our Civil Service as " the Bureaucracy " and think of it as " the new despotism."

[53] See for example The Insurance Commissioner in the United States by Professor Patterson (Harvard University Press, 1927), p. 5.

Illustrations of executive action which is not legislative.

It may help towards a clearer understanding of what activities of State Departments may possess a legislative character, although regarded as executive, if we call attention to certain forms of statutory powers which are truly executive and in no sense legislative :—

(i) the power to issue a particular command, e.g., the power of the Minister of Health under the Public Health Act, 1875,[54] to order a sewer to be made at the expense of a defaulting County Borough Council;

(ii) the power to license, e.g., the power of the Home Secretary under the Cruelty to Animals Act, 1876,[55] to license a person to practise vivisection;

(iii) the power to remit a penalty, e.g., the power of His Majesty under the Remission of Penalties Act, 1875,[56] to remit a penalty under the Sunday Observance Act, 1780;[57]

(iv) the power to inspect, e.g., (*a*) the power of an inspector under the Factory and Workshop Act, 1901,[58] to inspect a factory, or (*b*) the power of two persons appointed by the workmen employed in a mine under the Coal Mines Act, 1911,[59] to inspect the mine;

(v) the power to inquire, e.g., the power of the Minister of Transport under the Regulation of Railways Act, 1871,[60] to inquire into the cause of a railway accident.

The essentially subordinate character of delegated legislation.

3. The power to legislate, when delegated by Parliament, differs from Parliament's own power to legislate. Parliament is supreme and its power to legislate is therefore unlimited. It can do the greatest things; it can do the smallest. It can make general laws for a vast Empire; it can make a particular exception out of them in favour of a particular individual.[61] It can provide—and has in fact provided—for the payment of old age pensions to all who fulfil the statutory conditions :[62] it can also provide—and has in fact

[54] 38 & 39 Vict., c. 55, s. 299.
[55] 39 & 40 Vict., c. 77, s. 8.
[56] 38 & 39 Vict., c. 80, s. 1.
[57] 21 Geo. 3, c. 49.
[58] 1 Edw. 7, c. 22, s. 119.
[59] 1 & 2 Geo. 5, c. 50, s. 16.
[60] 34 & 35 Vict., c. 78, s. 7.
[61] e.g., An Act (passed in 1887) to enable His Royal Highness the Duke of Connaught to return to England for a limited time for the purpose of being present at the celebration of Her Majesty's Jubilee without thereby resigning his command in Bombay (50 & 51 Vict., c. 10).
[62] 8 Edw. 7, c. 40.

provided—for boiling the Bishop of Rochester's cook to death.[43] But any power delegated by Parliament is necessarily a subordinate power, because it is limited by the terms of the enactment whereby it is delegated. *Limitations of delegated authority.*

It is a principle of our Constitution that whatever laws are passed by Parliament are binding, as the law of the land, on everybody. But it is also a principle of our Constitution that no one may be deprived of his liberty or of his rights except in due course of law—i.e., unless he has done something which the law says specifically shall have that effect. In the absence of a common law or a statutory authority, " A " cannot be deprived of rights by an executive act of a Minister; and if the Minister claims to have made a regulation entitling him to interfere with " A's " rights, the Courts will interfere to stop the Minister unless he can show by what authority, statutory or otherwise, he has made the regulation in question.

It follows, therefore, that to safeguard the second of the two principles just mentioned the precise limits of the law-making power, which Parliament intends to confer on a Minister, should always be defined in clear language by the statute which confers it.

Growth of delegation.

4. Before the middle of the nineteenth century the main functions of government in England were those of defence and police. The State Departments were few in number, and the management of the life of the people was not regarded as a function of government. In these circumstances Parliament was well able to pass all the necessary legislation itself, and there was no need to resort to any extensive delegation of legislative power. We have, however, already pointed out in the first paragraph of this Section that legislative powers were delegated on a modest scale even in the seventeenth and eighteenth centuries.[44] Mr. Carr in " Delegated Legislation "[45] has made the following analysis of the statutes of 1819 and 1820—two years taken at random—from the point of view of delegation :— *Early nineteenth century.*

> " The British Herring Fisheries Commissioners could make regulations about payment of bounty, shipment of salt and exportation of fish,[46]—such matters as the Ministry of Agri-

[43] 22 Hen. 8, c. 9:—" It is ordained and enacted by authority of this present Parliament that the said Richard Rose shall be therefore boiled to death without having any advantage of his clergy."

[44] We also pointed out that as early as 1531 the Statute of Sewers conferred on Commissioners of Sewers full power and authority to make laws, ordinances and decrees, and to amend and repeal such laws, and to make new laws as the cases necessary should require in that behalf. (23 Hen. VIII, c. 5, s. 4.)

[45] pp. 49-50.

[46] 1 Geo. 4, c. 103, s. 6.

culture and Fisheries would deal with to-day. The Commissioners of Irish Fisheries could also make regulations[67] though the regulations they could make are trifling compared with the detailed regulations already contained in the Act. The Irish Court of Exchequer could vary its table of fees by order of Court.[68] The Lord Lieutenant could reduce the statutory rate of interest on public works loans in Ireland.[69] There is a hint that the Treasury can make rules as to the drawing of lotteries.[70] Otherwise there is not much delegation in those two years.[71] Perhaps the only example of a statutory Order in Council is in the Act authorising justices to seize arms in certain disturbed counties; there is power to make proclamations extending the Act to other counties or withdrawing its operation in the counties prescribed.[72] At this stage, the practice of delegating legislative power is already understood, but Parliament is still able to do by itself almost all the legislating that the country requires."

We have already quoted in Section I the passage from the Report of Lord Macmillan's Committee, in which they draw attention to the profound change in the conception of the function of government which has since occurred, and to its effect on the Statute Book. We do not, however, think that they are quite accurate in suggesting—as they appear to suggest—that the change is of recent origin. It dates from the middle of the nineteenth century and was exhaustively analysed by Professor Dicey in "Law and Opinion in England"[73] in two lectures[74] entitled "The Growth of Collectivism" and "Period of Collectivism". Even in 1905 that distinguished constitutional lawyer regarded collectivism as predominant in English legislation[75] and expressed the opinion that its force was neither spent nor on the decline, but that the logic of events was leading to the extension and the development of legislation "which bears the impress of collectivism".[76] He found the true explanation in conditions not wholly democratic or even political."[77]

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[67] 1 Geo. 4, c. 82, s. 21.
[68] 1 Geo. 4, c. 68, s. 2.
[69] 1 Geo. 4, c. 81, s. 4.
[70] 1 Geo. 4, c. 72, s. 3.
[71] See 1 Geo. 4, c. 39, ss. 9, 39.
[72] 60 Geo. 3, c. 2, ss. 8, 9.
[73] Lectures on the Relation between Law and Public Opinion in England, by A. V. Dicey, K.C., B.C.L. (Macmillan & Co., Ltd., 1905).
[74] Lectures VII & VIII.
[75] p. 218 cf. p. 301, "The legislation of collectivism has continued now for some twenty-five or thirty years."
[76] *Ibid.*, pp. 300-1.
[77] p. 218 *et seq.* "The advance of democracy cannot afford the main explanation of the predominance of legislative collectivism."

Practical reasons for delegation.

There can, we think, be no doubt that the practice of delegating legislative powers to the Ministers of the Crown on the large and generous modern scale is the indirect consequence of this sort of legislation. Parliament nowadays passes so many laws every year, that it lacks the time to shape all the legislative details. "No one who looks at a collection of the annual output of delegated legislation can seriously propose that Parliament should now cancel the concession of legislative power and should undertake for the future under its own direct authority all the legislative activities which at present are left to His Majesty in Council or to the various public Departments "[78] Much of the detail is so technical as to be unsuitable for Parliamentary discussion—for example, "patents, copyright, trade marks, designs, diseases, poisons, the pattern of miners' safety lamps, wireless telegraphy, the heating and lighting values of gas, legal procedure, or the intricacies of finance ".[79] Many of the laws affect people's lives so closely that elasticity is essential. It is impossible to pass an Act of Parliament to control an epidemic of measles or an outbreak of foot-and-mouth disease as and when it occurs, and such measures as the Public Health Acts must be differently applied in different parts of the country. Free sale of poisons is now recognised to be contrary to the best interests of society :—"Why should Parliamentary time be occupied with the passing of a new Act merely because the doctors have come to the conclusion that ecgonine and heroin ought to be added to the statutory schedule? "[80]

These are the practical considerations which have induced Parliament to resort to the practice of wholesale and almost indiscriminate delegation. "England", said Lord Beaconsfield," is not governed by logic; she is governed by Parliament." The practice of delegation has been adopted from time to time under pressure of circumstance, and Parliament has steadily pursued a course without fully realising its attendant risks.

The truth is that if Parliament were not willing to delegate law-making power, Parliament would be unable to pass the kind and quantity of legislation which modern public opinion requires.

In 1916 the American lawyer and statesman, Mr. Elihu Root, in his presidential address to the American Bar Association, after summarising the agencies at work in the public life of the United States in the twentieth century, said :

> "Before these agencies, the old doctrine prohibiting the delegation of legislative powers has virtually retired from the field and given up the fight. There will be no withdrawal from these experiments. We shall go on; we shall expand them,

[78] "Delegated Legislation," p. 20.
[79] *Ibid.*, pp. 20-21.
[80] *Ibid.*, p. 9.

whether we approve theoretically or not, because such agencies furnish protection to right, and obstacles to wrong-doing, which under our new social and industrial conditions cannot be practically accomplished by the old and simple procedure of legislatures and courts as in the last generation."[41]

In our opinion these words are as applicable to the United Kingdom to-day as they were to the United States in 1916.

While, however, we find the true explanation of the practice of delegation in the legislative tendencies of modern England, and in the conditions produced by those tendencies, we are indebted to Sir William Graham-Harrison for the information that the practice has been deliberately encouraged by Lord Thring and his successors in the office of Parliamentary Counsel. As Sir William shows in his memorandum printed in the second of the companion volumes to our Report, Lord Thring was a strong believer in the principle of leaving details to be settled departmentally and withdrawing procedure and subordinate matters from the cognisance of Parliament: and Sir William tells us that Lord Thring's successors have consciously and whole-heartedly followed the principle.

No one familiar with the conditions under which business is transacted in Parliament will doubt that legislative methods and forms must of necessity be largely dependent on the suggestion of those skilled advisers, whether Departmental chiefs or Parliamentary Counsel, on whose experienced guidance the Ministers of the Crown must inevitably rely.

Possibilities of abuse.

We doubt however, whether Parliament itself has fully realised how extensive the practice of delegation has become, or the extent to which it has surrendered its own functions in the process, or how easily the practice might be abused.

Orders in Council, and Provisional Orders.

5. Before we describe the different forms assumed to-day by delegated legislation, it will be convenient to clear the ground by distinguishing two forms of original legislation which resemble delegated legislation in name but not in substance, viz., some "Orders in Council," and "provisional orders." Orders in Council are of two kinds, which from the point of view of our enquiry differ fundamentally in constitutional principle:—

(i) those made in virtue of the Royal Prerogative, and
(ii) those which are authorized by statute.

Prerogative Orders in Council.

(i) The Royal Prerogative may be regarded for our purpose as what is left of the original sovereign power of the Crown to legislate without the authority of the Houses of Parliament. Thus the Crown can legislate by Order in Council for a newly conquered

[41] 41 Amer. Bar. Assoc., 456, 369.

country and can regulate trade and commerce in time of war. The best known modern prerogative Order in Council is the Order dated the 16th of February, 1917, establishing a rigid blockade of enemy territory—commonly called the Second Reprisals Order. The essence of this kind of legislation by the King in Council without the intervention of Parliament is that it is original and in no sense delegated. The fact—and in modern constitutional practice it is a fact—that the King in such legislation is advised by His Cabinet does not modify this view.

Statutory Orders in Council.

(ii) Statutory Orders in Council are made in virtue of, and in accordance with powers expressly delegated by Act of Parliament. They are a much larger and constantly growing class. Prerogative Orders in Council, not being delegated legislation at all, are wholly outside our reference. Statutory Orders in Council, on the other hand, are in all aspects delegated legislation. They are instruments of greater dignity than Departmental orders, regulations, rules and so forth, but in principle and for our purposes do not differ from them.

Provisional Orders.

Similarly a provisional order is not delegated legislation. It is in practice drafted by a Department or some independent body like a statutory company and receives its final form before submission to Parliament, but it requires confirmation by an Act of Parliament to give it the force of law.

Its nature is well explained in the following passage[82] :—

> " The principles upon which the provisional order is based were set out by Sir G. Jessel, M.R., in *In re Morley* (L.R. 20 Eq. 17) when dealing with costs in connection with a provisional order made by the Board of Trade under the Tramways Act, 1870. ' The Legislature ' according to this authority, ' instead of allowing proceedings to be taken before a Committee of either House, decided that these inquiries might be prosecuted more cheaply and more beneficially before a local tribunal, or persons appointed to inquire into the matters locally. These proceedings are instituted, and the parties, instead of applying to Parliament, apply to the Board of Trade; and after making a proper investigation in the locality, the Board of Trade makes a provisional order, and then, if Parliament sees fit, that provisional order, generally with a great many more, is confirmed by an Act of Parliament, which is not procured at all by the applicants, but by the Board of Trade—that is, by the Executive Government of the country. The result is that there has been an entire change of system, and all that the applicant obtains is the provisional order, and there is no proceeding in Parliament with which

[82] Taken from an Article by Mr. Arthur Scott Quekett (now Sir Arthur, Parliamentary Counsel to the Government of Northern Ireland), in the Law Quarterly Review for October, 1918, Vol. 34, p. 357.

he really has anything to do directly.' If, however, any opposition is raised, a Bill to confirm a provisional order can usually be referred to a Select Committee, and the parties must then appear to promote and oppose, as in the case of an ordinary private Bill. Although the confirming Bill is brought in by the Government in the first instance, if such opposition is raised, the conduct of the proceedings in Committee may be left to the promoters."

Forms of delegated legislation.

6. Delegated legislation by Ministers of the Crown invariably takes one of two forms :—

(*a*) *the statutory Order in Council;*
(*b*) *the Departmental regulation.*

Statutory Orders in Council.

(*a*) Statutory Orders in Council occupy the place of honour in delegated legislation.

"Until our administrative Departments (which in some instances are offshoots of the Privy Council) reached their present elaboration," says Mr. Carr in "Delegated Legislation,"[83] "the King in Council or the Privy Council was the obvious authority available to undertake to make rules and regulations. The more elaborate our Departments become, the more do they take over the legislative powers entrusted in time past by Parliament to the Privy Council. Yet, even now, though the Home Office is specially concerned with aliens and the Air Council with aerial navigation, the big codes governing those topics are issued not on the authority of the heads of those Departments but on the authority of an Order in Council. Doubtless the Department prepares the drafts, but the formal legislative act is made more dignified—one might almost say more national—by being united with the traditions of the King in Council."

Varieties of Departmental Regulations

(*b*) The expression "Departmental regulations" is an accurate and comprehensive description of all Ministerial delegated legislation other than Orders in Council. As we have already observed, Departmental regulations appear under various names. They are sometimes called regulations, sometimes rules, and sometimes orders. A regulation under Section 82 of the Post Office Act, 1908,[84] may be made by Treasury "warrant"; and under Section 13 of the Regimental Debts Act, 1893,[85]

[83] p. 55.
[84] 8 Edw. 7, c. 48.
[85] 56 & 57 Vict., c. 5.

His Majesty Himself may by "warrant" under the Royal Sign Manual make regulations for the execution of the Act. Where the Minister of Health confirms a bye-law made by a District Council[86] or a town planning scheme proposed by a Local Authority he is exercising what is constitutionally a legislative function, though he may, in order to place himself in a position to consider the matter, follow a judicial process and may address himself to his task in a judicial spirit. Indeed when he appoints a day or gives a certificate, he may be doing an act with legislative efficacy. But confusing as these various expressions are, they are merely different names for the same thing—a piece of delegated legislation issued on the authority of a Minister, as distinct from the Privy Council itself. Nor is it possible to discover in the existing practice any rational plan for calling one piece of legislation a warrant, another an order, and another something else. The most scientific explorer cannot make a map of a jungle.

Special Orders.

As we pointed out in paragraph 2 on page 18, the term "special orders" is used with bewildering variety. For example, Sections 80 and 81 of the Factory and Workshop Act, 1901[87] (which apply to the making of *regulations* under that Act), as set out and adapted in the Schedule to the Gas Regulation Act, 1920,[88] are made to apply to the making of special orders under the Gas Act; but they do not apply to special orders under the Factory Act itself, which appear to have no feature which distinguishes them from orders in general except a grander name.

It is true, as Sir William Graham Harrison pointed out in his evidence (Memorandum paragraph 4 (v)), that the term has also been used by Parliament to describe certain orders (made or confirmed by Ministers) which were intended to take the place of provisional orders confirmed by Act of Parliament. See for instance Section 26 of the Electricity (Supply) Act, 1919.[89] But the inten-

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[86] e.g., under Section 184 of the Public Health Act, 1875 (38 & 39 Vict., c. 55).

[87] 1 Edw. 7, c. 22.

[88] 10 & 11 Geo. 5, c. 28 (see s. 10).

[89] 9 & 10 Geo. 5, c. 100. The Section is as follows:—

"Anything which under the Electric Lighting Acts may be effected by a provisional order confirmed by Parliament may be effected by a special order made by the Electricity Commissioners and confirmed by the Board of Trade under and in accordance with the provisions of this Act, or by an order establishing a joint electricity authority under this Act, and references in those Acts and the Electric Lighting (Clauses) Act, 1899, to provisional orders shall be construed as including references to such special orders and orders as aforesaid, except that the paragraphs numbered (1) to (4) of Section four of the Electric Lighting Act, 1882, shall not apply to such special orders and orders as aforesaid, and any

tion did not lead to any real distinction between ordinary and " special " orders of a Minister. In Section 26 the Parliamentary Bill followed by the Royal Assent is replaced by an affirmative resolution of each House ; and it might be thought at first sight that this is the distinguishing feature of a special order ; but other sections of the Act (e.g. Section 15) allow other things to be done by special order ; and Section 35 defines the procedure for a " special " order as laying before Parliament, not with the requirement of an affirmative resolution as under Section 26 but only subject to a proviso for annulment on a hostile resolution—the ordinary procedure adopted by Parliament for Ministerial orders in general which do not boast the proud title of " special."

Moreover special orders vary greatly in their intrinsic nature. At one end of the scale they may be plainly legislative and at the other end scarcely more than administrative. For instance a special order under the Trade Boards Act, 1918,[90] withdrawing a trade from the operation of the Trade Boards Act, 1909,[91] or a special order under the Gas Regulation Act, 1920,[88] authorising a Local Authority to supply gas outside their own district is plainly legislative ; whereas a special order under the Factory Act[87] directing thermometers to be provided in a class of factories[92] or determining what is sufficient and suitable accommodation[93] in the way of sanitary conveniences, is scarcely more than administrative.

There is a still further use of the term " special orders " in the recent Standing Order of the House of Lords to describe certain rules, regulations or other documents which require an affirmative resolution of that House.[94]

It is clear that special orders cannot usefully be regarded for our purposes as a separate and well defined class of delegated legislation.

Difficulty of classifying Delegated Legislation.

No existing simple classification.

7. There is no simple classification of the heterogeneous collection of regulations, rules and orders in force to-day ; nor is it easy to formulate one which is either simple or satisfactory. Indeed unless

provisional order made under the Electric Lighting Acts and confirmed by Parliament may be amended or revoked by any such special order or order as aforesaid :

" Provided that a special order made in pursuance of the powers conferred by this section shall be laid before each House of Parliament and shall not come into force unless and until approved, either with or without modifications, by a resolution passed by each such House."

[90] 8 & 9 Geo. 5, c. 32.
[91] 9 Edw. 7, c. 22.
[92] s. 6, subs. (2).
[93] s. 9.
[94] Sir William Graham Harrison regretted the application of the term to this class as it tended to cause confusion between them and the special orders described above (Memorandum of Evidence, para. 4 (iv), (3rd day).

classification leads to some useful differentiation of procedure there is not much to be gained by it. Parliament itself has made or authorised the making of several different classifications :—

Laying before Parliament.

No. 1.—The first divides them broadly into

(*a*) those required by the enabling statute to be laid before Parliament, and

(*b*) those not so required.

Section 1 of Rules Publication Act.

No. 2.—Section 1 of the Rules Publication Act, 1893,[95] makes a subdivision of class No. 1 (*a*) by requiring a certain procedure of preliminary notice for *some* of the regulations etc. contained in this class but not for all.

Section 3 of Rules Publication Act.

No. 3.—A different classification results from Section 3 of that Act, and the Treasury Regulations made thereunder, which divide regulations etc. into—

(*a*) those required to be sent to the King's Printer;

(*b*) those not so required.

Legislative and executive regulations.

No. 4.—Class (*a*) of classification No. 3 is defined by the Treasury Regulations as including " every exercise of a statutory power by a rule-making authority which is of a legislative and not an executive character "; but as excluding an exercise which is " confirmed only " by a rule-making authority. This classification purports to make a division of principle between legislative and executive regulations; but in so far as any given set of regulations which are mainly executive may contain some which are legislative, and in so far as the confirmation by a Minister gives legislative efficacy, the classification in practice departs from its own principle.[96]

General and local regulations.

No. 5.—Those regulations which are sent to the King's Printer are sub-divided into :—

(*a*) those which are printed;

(*b*) those which are not.

The practice is to print[97] nearly every regulation sent to the King's Printer which is public and not local in character, so that the sub-division into those which are printed and those which are not is almost identical with the sub-division into

(*a*) Public and General;

(*b*) Local.

The distinction between public and local regulations follows in the main that between public and local Acts of Parliament.

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[95] Paragraph 9 (on page 44) below gives a fuller explanation of Section 1 of the Rules Publication Act, 1893 (56 & 57 Vict., c. 66), and paragraph 15 contains our recommendations for removing its anomalies.

[96] The Rules Publication Act, 1893 (56 & 57 Vict., c. 66), the Treasury Regulations made thereunder in 1894, and the Treasury Circular of the 25th November, 1921, are printed as Annex I to this Report (see p. 119).

[97] See para. 9, page 47, for fuller description of the arrangements for printing.

The classifications of the Rules Publication Act, 1893, are thus of little use for our purposes; they throw small light on the problems of principle which we have to consider. For similar reasons we cannot regard the published volumes of " Statutory Rules and Orders " as defining our field.

Normal and exceptional types of delegated legislation.

8. We have already observed that the system of delegated legislation has been built up haphazard without plan or logic, and that the extent and limits of delegation have been determined by accident and expediency and not upon any system. It is difficult to find and it may be misleading to look for any clear and conscious purpose in the historical development of the process. But it is possible to distinguish between two types of delegated legislation, and to say that one of them represents the *normal* and the other the *exceptional* practice of Parliament.

The normal type (A).

The *normal* type of delegated legislation has two distinguishing characteristics :—one positive and the other negative.

The positive characteristic is that the limits of the delegated power are defined so clearly by the enabling Act as to be made plainly known to Parliament, to the Executive and to the Public, and to be readily enforceable by the Judiciary.

The negative characteristic is that powers delegated do not include power to do certain things, namely—

(i) to legislate on matters of principle or to impose taxation;

(ii) to amend Acts of Parliament, either the Act by which the powers are delegated, or other Acts.

A good example of the normal type of delegated legislation is to be found in the Road Traffic Act, 1930.[98] Section 10 and the First Schedule of that Act prescribe the rate of speed to be observed by the various classes and descriptions of motor vehicles on roads in Great Britain generally; but Section 46 confers on the Minister of Transport, on the application of a Local Authority, wide powers of further restricting or even prohibiting the driving of motor as well as other vehicles or of any specified class or description of vehicles on any specified road within the area of the Local Authority making the application. No one who has ever been in a motor car would desire Parliament to undertake this task itself, and the staunchest upholder of the British Constitution is unlikely to maintain that it is seriously threatened by delegation of such a type.

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[98] 20 & 21 Geo. 5, c. 43.

There are, however, to be found on the Statute Book certain *exceptional* instances of delegated legislative powers, which may be conveniently classified as follows :— *The exceptional type (B).*

(i) Instances of powers to legislate on matters of principle, and even to impose taxation;

(ii) Instances of powers to amend Acts of Parliament, either the Act by which the powers are delegated, or other Acts;

(iii) Instances of powers conferring so wide a discretion on a Minister, that it is almost impossible to know what limit Parliament did intend to impose;

(iv) Instances where Parliament, without formally abandoning its normal practice of limiting delegated powers, has in effect done so by forbidding control by the Courts.

Before we deal separately with each of these four classes of exceptional delegation we desire to point out that they have one feature in common. When Parliament has resorted to any of them, it has generally been on account of the special nature of the subject matter and without the intention of establishing a precedent.

A remarkable instance of power to legislate on matters of principle is now to be found in sub-section 1 of Section 136 of the Poor Law Act, 1930,[99] which begins : *(i) Instances of powers to legislate on matters of principle and even to impose taxation.*

> " For executing the powers given to him by this Act[100] the Minister (of Health) shall make such rules, orders and regulations as he may think fit for—
>
> (*a*) the management of the poor . . . . "

This power was conferred by Parliament on the Poor Law Commissioners in 1834,[101] has been on the Statute Book ever since, and has been vested in the Minister of Health since the creation of his office in 1919[102].

In 1834 the administration of the poor law, which down to that time had been carried on partly by parochial officers, partly by the justices of the peace, had for a long time past become very unwise and extravagant and a thorough reform was necessary. Parliament felt unequal to the task and determined to establish a body

[99] 20 & 21 Geo. 5, c. 17. The subsection is also a striking instance of Class (iii) of the exceptional type.

[100] The Minister is, subject to the provisions of the Act, charged with the direction and control of all matters relating to the administration of relief to the poor throughout England and Wales according to the law in force for the time being (s. 1. ss. (1)).

[101] 4 & 5 Will. 4, c. 76, s. 15.

[102] 9 & 10 Geo. 5, c. 21.

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[101] 4 & 5 Will. 4, c. 76, s. 15.

[102] 9 & 10 Geo. 5, c. 21.

of Poor Law Commissioners with a large control over the whole poor law system and wide powers of legislation. It was expected that the commission would only be necessary for a time, but it was renewed again and again[103] and developed first in 1847 into the Poor Law Board,[104] then in 1871 into the Local Government Board[105] and finally in 1919 into the Ministry of Health.[102]

Few Acts of Parliament contain so wide a regulation-making power as this power which Parliament conferred in 1834 on the Poor Law Commissioners and eventually by succession upon the Minister of Health.

A notable example of the delegation of a power to impose taxation was contained in Part II of the Safeguarding of Industries Act, 1921[106]. That part of that Act was aimed at the prevention of dumping. Section 2 empowered the Board of Trade (after reference to a committee sitting in public except when hearing evidence on confidential matters) to make orders applying that Part of that Act to goods of any class or description (other than articles of food or drink), manufactured in any specified country or countries outside the United Kingdom, if certain statutory conditions precedent were fulfilled; and Section 3 provided that any goods in respect of which an order had been made should on importation into the United Kingdom be liable to duties of customs equal to one-third of their value in addition to any other duties of customs chargeable thereon. Rigorous safeguards for control by the House of Commons were provided by sub-section 4 of Section 2 of the Act, which provided that when the House of Commons was sitting, or being adjourned or prorogued would sit within a month, no order should be made unless the draft of it were approved, with or without modification, by a resolution of the House and that in other cases, while the order might be made forthwith, it should not continue in force for longer than one month after the next meeting of the House without a resolution of that House authorising its continuance with or without modification.

Two orders were made under Section 2, both of them in 1922. The draft of one[107] was laid before the House of Commons and approved: the other[108] was made during the Recess and was continued in force when the House met. The whole of Part II of the Act was repealed by the Finance Act, 1930.[109]

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[103] 2 & 3 Vict., c. 83; 3 & 4 Vict., c. 42; 5 Vict., c. 10; 5 & 6 Vict., c. 57.
[104] 10 & 11 Vict., c. 109. The Board was not made permanent till 1867 (30 & 31 Vict., c. 106).
[105] 34 & 35 Vict., c. 70.
[106] 11 & 12 Geo. 5, c. 47.
[107] The Safeguarding of Industries (No. 1) Order, 1922 (Fabric Gloves and Domestic Ware, etc., S.R. & O., 1922, No. 853).
[108] The Safeguarding of Industries (No. 2) Order, 1922 (Gas Mantles, S.R. & O., 1922, No. 1088).
[109] 20 & 21 Geo. 5, c. 28.

Recent emergency examples of exceptional type.

During the conditions of emergency which have obtained since August last, Parliament has not hesitated in several far-reaching and important statutes to delegate on matters of principle, all in a brief period of Parliamentary time; though in each case a time limit has been imposed on the use of the emergency powers. The following five Acts were passed in the Autumn of 1931 :—

(1) *The Gold Standard (Amendment) Act*, 1931,[110] (Royal Assent 21st September, 1931) empowered the Treasury (Section 1 (3)) to make and from time to time vary orders authorising the taking of such measures in relation to the Exchanges and otherwise as they may consider expedient for meeting difficulties arising in connection with the suspension of the Gold Standard. The sub-section is in force for six months from the passing of the Act.

(2) *The National Economy Act*, 1931,[111] (Royal Assent 30th September, 1931) empowered His Majesty during the period of one month after the commencement of the Act to make Orders in Council effecting economies in respect of the services specified in the Schedule to the Act, and in respect of the remuneration (otherwise than by way of pension assessed before the commencement of the Act) of persons in His Majesty's service. Sub-section 2 of Section 1 provided that the Minister designated in any such Order might make regulations for giving effect to the Order, and sub-section 3 provided that any Order or regulations should, as from a date not earlier than 1st October, 1931, have effect notwithstanding anything in any enactment.

(3) *The Foodstuffs (Prevention of Exploitation) Act* 1931[112] (Royal Assent 7th October, 1931), authorised the Board of Trade, in case of need, to take exceptional measures for preventing or remedying shortages in, or unreasonable increases in the prices of, certain articles of food and drink. Section 2, sub-section 3, provided that the Act should cease to take effect on the expiration of six months from the passing thereof. Section 1, sub-section 3, provided that any regulations should be laid before each House of Parliament as soon as may be after they are made, and that if an address is presented by either House within the next subsequent 20 days on which that House has sat praying that the regulation may be annulled, it shall thenceforth be void but without prejudice to the validity of anything done thereunder or to the making of any new regulation.

(4) *The Abnormal Importations (Customs Duties) Act* 1931[113] (Royal Assent 20th November, 1931), empowered the Board of Trade, with the concurrence of the Treasury, with a view to

[110] 21 & 22 Geo. 5, c. 46.
[111] 21 & 22 Geo. 5, c. 48.
[112] 21 & 22 Geo. 5, c. 51.
[113] 22 Geo. 5, c. 1.

preventing the importation into the United Kingdom in abnormal quantities of articles wholly or mainly manufactured, by order to impose customs duties up to an amount not exceeding 100 per cent. of value on any of the articles comprised in Class III of the "Import and Export List," subject to subsequent confirmation by affirmative resolution of the House of Commons within a limited period. The Act is in force for six months and no longer (Section 7, sub-section 3).

(5) *The Horticultural Products (Emergency Customs Duties) Act* 1931[114] (Royal Assent, 11th December, 1931), empowered the Minister of Agriculture and Fisheries, with the concurrence of the Treasury, with a view to reducing the importation into the United Kingdom of certain classes of fresh fruit and fresh vegetables and other horticultural products, the production of which in the United Kingdom can be increased, or which are articles of luxury, by order to impose duties up to 100 per cent. of value on any of certain scheduled articles. The Act is to continue in force for twelve months and no longer. Orders may have immediate effect but are to be laid before the House of Commons so soon as may be after they are made, and require subsequent approval of that House by affirmative resolution within a limited period (Section 1, sub-section 2). A rule or regulation contained in such orders is not to be deemed to be a statutory rule within the meaning of Section 1 of the Rules Publication Act, 1893.[115]

These five very recent examples of delegated legislation on matters of principle or of taxation were all treated by Parliament as occasioned and justified by the emergency. As the exceptional type of delegation characteristic of emergency legislation no less than any other falls within our terms of reference it is our duty to report our views upon it. We deal further with it in paragraph 11 below. But we would point out here, incidentally, that it is of interest for our present purpose to note the great diversity of form observable in these five statutes in regard to the procedure and to the safeguards provided in them for the delegated legislation which they authorise. Our general view is, that even in the exceptional types of power to pass delegated legislation it is desirable to standardise both procedure and safeguards as far as possible. Nothing is more apt to create legal ambiguities of meaning than variation of language without difference of intention.

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[114] 22 Geo. 5, c. 3.

[115] No similar exemption for the Board of Trade will be found in the Abnormal Importations (Customs Duties) Act, 1931, just mentioned, for that Board is already entirely exempted from Section 1 of the Rules Publication Act by subsection (4) thereof. (See below, page 45.)

The Import Duties Act, 1932.

There is, however, an even more recent example of the delegation of power to legislate on matters of taxation, and to the exercise of this power no time limit is fixed by the delegating enactment.

The Import Duties Act, 1932,[115a] imposes a general ad valorem customs duty of ten per cent. on all goods imported into the United Kingdom other than exempted goods. Many goods are expressly exempted by the Act itself, and the Treasury is empowered, after receiving a recommendation from the Import Duties Advisory Committee, constituted under the Act, and after consultation with the appropriate Department, to direct by order that any other goods of whatsoever class or description shall also be exempted. During the first six months after the passing of the Act this power may only be exercised in cases of special urgency: but after the expiration of that period this limitation on the power will cease.[115b]

In the case of articles of luxury or articles of a kind which are being produced or are likely within a reasonable time to be produced in the United Kingdom in quantities which are substantial in relation to United Kingdom consumption, the Committee may, having due regard to the advisability in the national interest of restricting imports into the United Kingdom and the interests generally of trade and industry in the United Kingdom, recommend additional duties at such rates as they may specify; and the Treasury may, if they think fit after consultation with the appropriate Department, by order direct that additional duty at a rate not exceeding the amount recommended shall be charged.[115c]

Neither the general ad valorem duty nor any additional duty is chargeable on the products or manufactures of the Crown Colonies or territories under His Majesty's protection: and the like exemption may be granted by Order in Council to any mandated territory.[115d]

In the case of the products and manufactures of the Dominions, India and Southern Rhodesia, neither the general ad valorem duty nor any additional duty is chargeable till the 15th of November, 1932; and after that date both exemptions and preferences may be granted for such goods by orders made by the Treasury on the recommendation of the Secretary of State.[115e]

In the case of foreign goods exemptions and preferences may be granted by orders made by the Treasury on the recommendation of the Board of Trade, and in the case of foreign countries which discriminate against British goods supplementary duties may be

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[115a] 22 Geo. 5, c. 8. A further reference to this Act will be found in Section III, paragraph 18.
[115b] Sections 1 and 2 and First Schedule.
[115c] Section 3.
[115d] Section 5.
[115e] Section 4.

imposed by the Board of Trade by orders made with the concurrence of the Treasury.[115f] Power is given to the Board of Trade to make regulations as to proof of the country of origin.[115g]

Any order made by the Treasury or the Board of Trade under the Act must be laid before the House of Commons as soon as may be after it is made. If it imposes a customs duty, it will cease to have effect unless it is approved by resolution of the House within 28 Parliamentary days; and if it does not impose a customs duty, it may be annulled by resolution of the House within the same period.[115h]

The Import Duties Advisory Committee may authorise the delegation of any of their functions to a sub-Committee consisting of members of the Committee.[115i]

Such are the leading provisions of what is obviously one of the most important delegating enactments which Parliament has ever passed but we do not feel justified in attempting an estimate of so far-reaching a measure at so early a stage in its existence.[115j]

(ii)Instances of powers to amend Acts of Parliament, either the Act by which the powers are delegated,or other Acts. The "Henry VIII Clause."

(I) In each of eight modern Acts of Parliament, passed between 1888 and 1929, power has been conferred on the appropriate Minister to modify the provisions of the Act so far as may appear to him to be necessary for the purpose of bringing the Act into operation.

In the Local Government Act, 1894,[116] the like power was conferred on the appropriate County Council.

This class of enactment has acquired the nickname of "the Henry VIII clause" because that King is regarded popularly as the impersonation of executive autocracy. Indeed it may be considered to resemble the famous Statute of Proclamations, 1539,[117] which gave the King power to legislate by proclamation until it was repealed on Henry's death in 1547.[118] The comparison is certainly far-fetched.

The purpose of Henry VIII was to enlarge his powers to make proclamations having the force of law. The sole purpose of Parliament on the nine occasions when it passed the modern enactment was to enable minor adjustments of its own handiwork to be made for the purpose of fitting its principles into the fabric of existing legislation, general or local, and of meeting cases of hardship to Local Authorities.

[115f] Sections 7 and 12.
[115g] Section 7 (2).
[115h] Section 19.
[115i] Section 2, ss. 6.
[115j] The Wheat Quota Bill has also been introduced into the House of Commons: but as the Committee stage has not yet concluded we refrain from comment.
[116] 56 & 57 Vict., c. 73.
[117] 31 Henry 8, c. 8.
[118] 1 Edw. 6, c. 12.

In eight of the nine instances the provision was transitory, and the last of them—the provision contained in Section 130 of the Local Government Act, 1929[119]—ceased to have effect on 31st December, 1930. The exception is Section 80 of the Local Government Act, 1894[118] (which as we have seen above confers powers on the County Council and not on any Minister), which is permanent in its effect; but as it relates to difficulties arising with respect to the holding of the *first* parish meeting or the *first* election of parish or district councillors, it has no longer any operation except as regards newly created parishes or districts.

All these nine enactments will be found set out in Annex II to this Report.

The Enabling Act.

(II) Before we turn to Acts conferring power on the Executive to amend other Acts, it may be interesting to mention an interesting example of what at first sight seem to be, but are not, powers of delegated legislation, which is to be found in the Church of England Assembly (Powers) Act, 1919,[120] commonly known as the Enabling Act.

By that Act the Church Assembly, a subordinate body, is empowered to propose legislation " touching matters concerning the Church of England." The measures so proposed may " extend to " the repeal or amendment of Acts of Parliament including the Church Assembly Act itself. But although all the initial stages of legislation are thus left to the exclusive jurisdiction of the subordinate body, and although Parliament has reserved to itself no power of amending the measure so framed, it is not until Parliament itself—i.e. The King, Lords and Commons—have conferred on it legislative force by an affirmative address of each House, followed by the Royal Assent, given in the same way as to an ordinary Bill, that the measure is converted from a draft into legislation. The example thus falls into precisely the same constitutional category as the provisional order procedure (see paragraph 5), and although by its procedure the Enabling Act does permit of existing Acts of Parliament being altered, the alteration is in fact made by Parliament itself and not by the Church Assembly. In essence the Church Assembly Act is not an instance of delegated legislation.

Powers to amend other Acts.

Turning now to Acts which confer power on the Executive to amend other Acts, we find a typical example in the Juries Act, 1922,[121] where power is given to make provision by Order in Council for making such adaptations in any enactments as are necessary for giving full effect to the Act.

Another is contained in Section 20 of the Mental Treatment Act, 1930,[122] which empowers the Minister of Health by order to modify the wording of any enactment so far as is necessary to bring it into

[119] 19 & 20 Geo. 5, c. 17.
[120] 9 & 10 Geo. 5, c. 76.
[121] 12 & 13 Geo. 5, c. 11, s. 6.
[122] 20 & 21 Geo. 5, c. 23.

conformity with the provisions of the section. It should be noted that the whole section relates only to terminology, its intention being to replace certain statutory expressions in previous use by others which at the moment were regarded as less offensive.

Provisions of greater importance, however, are to be found in the Local Government (Scotland) Act, 1929,[123] a measure which effected sweeping changes in the system of local government in Scotland. By Section 76 the Secretary of State was empowered—

(A) between the 16th of May, 1929, and the 31st of December, 1930, to make by order " any adaptations or modifications of the provisions of any Act necessary to bring those provisions into conformity with the provisions of this Act ".

(B) At any time after the 16th of May, 1929, to make by order " such adaptations in the provisions of any local Act as may seem to him to be necessary in order to make those provisions conform with the provisions of this Act, or in order to make an equitable adjustment or apportionment of any expenditure or payment under the local Act, consequent on the carrying into effect of the provisions of this Act ".

A somewhat similar power is conferred on Local Authorities in regard to town planning schemes by sub-section (2) of Section 55 of the Housing, Town Planning, etc., Act, 1909, as amended by Section 44 of the Act of 1919.[124]

(iii) *Instances of powers conferring so wide a discretion on a Minister that it is almost impossible to know what limit Parliament did intend to impose.*

There are on the Statute Book several enactments which confer powers on a Minister and contain no limiting definition of those powers, but leave everything to the Minister's discretion in plain but wide language—such as " to carry out this Act " or " to give effect to the provisions of this Act ". The Poor Law Act of 1834[125] quoted above under Class (i) of the " Exceptional " type is itself a good illustration. Another example is afforded by the Patents, Designs and Trade Marks Acts, 1883[126] and 1888.[127] Sub-section 1 of Section 1 of the later Act provides that after the 1st of July, 1889, a person shall not be entitled to describe himself as a patent agent, unless he is registered as a patent agent in pursuance of the Act. Sub-section (2) provides that the Board of Trade shall make such general rules as are *in the opinion of the Board* required for giving effect to the section.

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[123] 19 & 20 Geo. 5, c. 25.
[124] 9 Edw. 7, c. 44 and 9 & 10 Geo. 5, c. 35; see also Clause 11 (1) *b* of the Town and Country Planning Bill now before Parliament.
[125] 4 & 5 Will. 4, c. 76, s. 15.
[126] 46 & 47 Vict., c. 57.
[127] 51 & 52 Vict., c. 50.

The meaning of the section, as affecting the validity of the Register of Patent Agents Rules, 1889, which were made under it by the Board of Trade, was considered by the House of Lords in *Institute of Patent Agents* v. *Lockwood*, 1894 A.C. 347. The House decided that the section left the whole scheme to the discretion of the Board of Trade, and that it was therefore not within the province of a Court of Law to canvass the merits of the particular scheme embodied in the Rules of 1889.

It is worth noticing that the Lord Chancellor (Lord Herschell) expressed the opinion that judicial control of the scheme would not have been an improvement on the method of legislation which had been followed in the section.

Another example is to be found in Part IV of the Road Traffic Act, 1930,[128] which provides for the regulation of public service vehicles. The regulation of such vehicles is committed to bodies of Traffic Commissioners established by the Act, but Section 81 gives wide rights of appeal from their decisions to the Minister of Transport, and empowers him on any such appeal to make such order as he thinks fit, and provides that any such order shall be binding on the Commissioners.

Parliament, no doubt, considered that Part IV of that Act was one of those enactments, regulating improvements for the benefit of the general public, of which Lord Watson said in *Lockwood's case* (referred to above) that every neighbouring member of the public has a certain interest in seeing them enforced, and that it would never do to permit the Civil Courts to adjudicate as to them.[129]

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[128] 20 & 21 Geo. 5, c. 43.

[129] We invite particular attention to the above statutes as illustrations of the inseparable mingling, which so often appears in delegated legislation, of the theoretically separate functions of legislation and justice. In so far as the delegated legislation regulates the life of the community for the future on certain principles it is true legislation. In so far as the application of the rules so made affects the rights of persons (individual or corporate), dispute may arise about the existence or not of the conditions precedent upon which the Minister's right to make or apply his legislation depends. If such a dispute arises, it is a justiciable issue, and its determination is a truly judicial function. But in practical politics an academic attempt to draw the theoretical line may be contrary to common sense; it may be necessary to leave all such questions, legislative and judicial, to the executive discretion of the Minister. Any other course may be inconsistent with good administration. But it is important to remember that what is truly legislative may also have a judicial aspect; and this truth underlies the famous judgment of Lord Atkin in the case of Rex. v. Electricity Commissioners (1924) 1 K.B. p. 171.

(iv) *Instances where Parliament, without formally abandoning its normal practice of limiting delegated powers, has in effect done so by forbidding control by the Courts.*

In many statutes Parliament has provided that the Minister may make an order under the Act, and that the order when made " shall have effect as if enacted in this Act." The latter half of the provision has been much discussed, and criticised, on the assumption that it prevented a Court of Law from inquiring into the order.

All such criticism has, however, been laid to rest by the decision of the House of Lords in *Minister of Health* v. *The King* (*on the Prosecution of Yaffe*), 1931 A.C. 494, in which the House laid it down, that while the provision makes the order speak as if it were contained in the Act, the Act in which it is contained is the Act which empowers the making of the order, and that therefore, if the order as made conflicts with the Act, it will have to give way to the Act. In other words, if in the opinion of the Court the order is inconsistent with the provisions of the Act which authorises it, the order will be bad.

It is, therefore, clear that the validity of any order made under a provision so worded remains legally open to question, and that it is only when what is done falls within the limits of the powers conferred, and conforms to the conditions imposed, that the order acquires the force of law.

Some statutes however contain a different and more elaborate provision which seems on its face to have been designed with the express purpose of completely and finally excluding all control by the Courts. It runs as follows :—

> " The Minister may confirm the order and the confirmation shall be conclusive evidence that the requirements of this Act have been complied with, and that the order has been duly made and is within the powers of this Act."[130]

The limitations of delegated power.

This type of provision has not yet been considered by the House of Lords, and we therefore refrain from expressing a definite opinion upon its scope and effect. It is, however, we think, plain that the protection afforded even by this clause is not limitless. If the Minister of Agriculture and Fisheries went out of his province altogether in confirming an " order " (i.e. a regulation) under Section 39 of the Small Holdings and Allotments Act, 1908;[131] if, for example, he confirmed an order which provided for boiling the Bishop of Rochester's cook to death,[132] we doubt whether the order would be protected by this section, although, if a new Act of Parliament were to be passed expressly conferring such a power, the order would be unassailable.

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[130] See for example, the Small Holdings and Allotments Act, 1908, (8 Edw. 7, c. 36), s. 39, and the Housing Act, 1925 (15 & 16 Geo. 5, c. 14), Third Schedule.

[131] 8 Edw. 7, c. 36.

[132] See 22 Hen. 8, c. 9, cited above in paragraph 3.

But the clause is objectionable, and we doubt whether it is ever justified. In exceptional cases where Parliament may determine that it is necessary to confer on a Minister the power to make regulations whose validity is not to be open to challenge in the Courts, the enabling statute should declare this intention in clear and precise language. We revert to this topic in paragraph 14 on page 61 below where we discuss judicial control over delegated legislation.

There are certain Acts which confer power on Ministers to add to lists of subject matter contained in Schedules—e.g. the Poisons and Pharmacy Act, 1908[133] and the Trade Board Acts, 1909 and 1918[134]—or even to alter them—e.g. the Companies Act, 1929[135]. Such a power, no doubt, in a legal sense involves amendment of the Act, but it is not amendment in the sense in which the critics object to delegated power to amend Acts of Parliament, because the lines along which amendment should move are clearly laid down in the amending Act itself. Such cases may therefore, properly be regarded as nearer to the normal than the exceptional.

Safeguards provided by Parliament.

9. Apart from the jurisdiction of the Courts of Law to decide whether a Minister has acted within the limits of his delegated power, what safeguards have we against abuse or objectionable exercise of such power?

Parliament, recognising the danger of such exercise, has taken care to provide two special safeguards, although they do not operate in all cases :

(*a*) the stipulation in the delegating enactment that the regulations made thereunder shall be laid before Parliament;

(*b*) the system of publicity provided for by the Rules Publication Act, 1893.[136]

Laying before Parliament.

(*a*) There is no general statute (neither the Rules Publication Act itself nor any other) which requires regulations to be laid before Parliament; but in many cases the delegating statute itself requires the regulation to be so laid. The requirement that the regulation shall be laid takes different forms in various statutes, e.g. :

(i) Laying—with no further directions;[137]

(ii) Laying—with provision that, if within a specified period of time a resolution is passed by either House for annulling (in some cases for annulling or modifying) the

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[133] 8 Edw. 7, c. 55.
[134] 9 Edw. 7, c. 22, and 8 & 9 Geo. 5, c. 32.
[135] 19 & 20 Geo. 5, c. 23.
[136] 56 & 57 Vict., c. 66.
[137] e.g. regulations under the Foreign Marriage Act, 1892 (55 & 56 Vict., c. 23): see s. 21 (2).

regulation, the regulation may—or shall—be annulled or modified, as the case may be, by Order in Council;[138]

(iii) Laying—with provision that the regulation shall not operate, until approved by resolution; or shall not operate beyond a certain specific period, unless approved by resolution within that period.[139] Sometimes it is an affirmative resolution of both Houses, but sometimes only of the House of Commons (e.g., orders of the Board of Trade under the Safeguarding of Industries Act, 1921, already mentioned on page 32);

(iv) Laying in draft for a certain number of days;[140]

(v) Laying in draft with provision that the regulation is not to operate till the draft has been approved by resolution.[141]

It is impossible to discover any rational justification for the existence of so many different forms of laying or on what principle Parliament acts in deciding which should be adopted in any particular enactment.

In cases in which regulations are subject to annulment if a resolution is passed within a specific number of days, there are extraordinary and quite illogical differences in the number of days specified in different statutes. In some cases the number is as great as 100; in others it is as small as 20.[142] Between these extremes lie periods of 40, 36, 30, 28 and 21 days; 28 and 21 days are common. In most cases "days" means "sitting days," i.e. days on which Parliament actually sits, but sometimes Parliament has neglected to specify that the days are to be sitting days.

It is usually provided that annulment shall be without prejudice to the validity of any action already taken under the regulation which is annulled.[143]

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[138] e.g. regulations under the Housing &c. Act, 1919 (9 & 10 Geo. 5, c. 35): see s. 7 (3): and rules under the Nurses Registration Act, 1919 (9 & 10 Geo. 5, c. 94): see s. 3 (4).

[139] e.g. orders for the compulsory acquisition of land by the Minister of Health on behalf of an authorised Association under Section 16 of the Town Planning Act, 1925 (15 & 16 Geo. 5, c. 16) and rules modifying and adapting an enactment made by the Board of Control under the Lunacy Act, 1890 (53 & 54 Vict., c. 5)—see the Mental Treatment Act, 1930 (20 & 21 Geo. 5, c. 23) S. 15 (2).

[140] e.g. Orders in Council under the Ministry of Health Act, 1919 (9 & 10 Geo. 5, c. 21, S. 8 (2)).

[141] e.g. certain parts of draft Orders in Council in regard to census particulars under the Census Act, 1920 (10 & 11 Geo. 5, c. 41, s. 1 (2) and Schedule).

[142] The maximum of 100 days occurs in the Supreme Court of Judicature (Ireland) Act, 1877 (40 & 41 Vict., c. 57, s. 69), applicable now to Northern Ireland by virtue of subsection (1) of Section 41 of the Government of Ireland Act, 1920 (10 & 11 Geo. 5, c. 67); the minimum of 20 days applies to regulations under the Unemployment Insurance Act, 1920 (10 & 11 Geo. 5, c. 30, s. 35 (3).

[143] See, for example, Housing &c. Act, 1919 (9 & 10 Geo. 5, c. 35), s. 7 (3).

House of Lords.

The procedure of the two Houses is similar but not identical. In the House of Lords notice of all papers presented to the House—including both regulations and draft regulations—appears in the first instance in the Minutes of Proceedings. A separate printed list of those papers required by Act of Parliament to be laid on the Table of the House for a specified number of days is published, showing the Act under which the paper is prescribed and the number of days it is required to lie. This list is circulated to all Peers from time to time, on an average once a fortnight.

In the case of regulations subject to annulment, the period for which the regulation is required to lie before Parliament is not usually less than 21 days; and as in most cases these are sitting days, the period covers about two months. These regulations therefore appear in the printed list circulated to Peers two or three times before the period expires. All papers presented to the House are kept in the Journal Office, where they are available for examination.

House of Commons.

In the House of Commons the procedure is much the same; i.e., notice of all papers presented appears first in the daily Votes and Proceedings and a separate printed list of these papers is also prepared and supplied to any Member who desires it. Twenty-one sitting days is equivalent to not less than one month in the case of the House of Commons and the list is published once a week.

When a regulation is technically laid on the Table of the House of Commons, the actual document is placed in the Library of the House. By direction of Mr. Speaker the public Departments have been notified on several occasions that such documents ought to be presented in duplicate, and this is now usually done, but is occasionally neglected.[144] When it is done, one copy is filed along with copies of similar papers, and placed on a central table in one of the rooms of the Library, where it is open to the inspection of any Member who wishes to see it. But as the custody and preservation of the document is important, the other copy is locked up, and a Member who wishes to see it must ask the Librarian or another responsible official to produce it. If only one copy is presented, this is always locked up, but can be produced at any time for inspection.

Procedure for Debate: House of Lords.

In the House of Lords a Peer who wishes to direct the attention of the House to a regulation lying on the Table can do so by a motion for papers, which admits of a division, or by a question, which does not.

In the case of any regulation subject to annulment any Peer can, of course, move the necessary resolution to annul and, if necessary, divide the House.

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[144] So we are informed by officers of the House.

House of Commons.

In the House of Commons any Member can move an address or motion to annul or disapprove a regulation or a draft regulation. In the case of any regulation which by statute is expressly made liable to annulment within a stated period, such an address is " exempted business," can be taken after 11 p.m., and admits of a division. But in the case of any other regulation a Member who wishes to move an address or motion must find time during the ordinary sittings of the House, which as a rule is impracticable; and the Member desiring to raise the question must therefore do so on the motion for adjournment during the limited time between 11 and 11.30 p.m. when no division is allowed.

In theory a Member of the House of Commons who wishes to direct attention to a regulation lying on the Table can do so any evening in which the House is sitting by raising the question on the motion for the adjournment; but in practice such a thing is hardly ever done.

Any Member of the House of Commons can ask a question about a regulation lying on the Table, and many questions are so asked; but no debate can take place in the House of Commons, as in the House of Lords, on a question, although the indirect influence of a question upon the Department concerned is often considerable, and may produce a degree of effect which would surprise the Member who uses this modern weapon of the House of Commons for controlling the Executive.

The Rules Publication Act, 1893.

(*b*) Antecedent publicity is undoubtedly a safeguard of the highest value particularly where it leads to consultation with the interests concerned; and Section 1 of the Rules Publication Act, 1893,[145] aims at securing such publicity in the case of such " statutory rules " as fall within its scope.

The expression " statutory rules " is defined in Section 4 of the Act. The definition makes it clear that the expression only extends to " rules," " regulations " and " byelaws " in the strict statutory sense of those words; so that " orders " are not within the scope of Section 1 at all unless they contain " rules " or " regulations ".

The section applies to all " statutory rules " which are required to be laid before Parliament other than :

(i) " Statutory rules " required either to be laid, or to be laid in draft, for a period before coming into operation :

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[145] 56 & 57 Vict., c. 66.

(ii) " Statutory rules " made by either the Minister of Health as successor to the Local Government Board, or the Board of Trade, or the Revenue Departments or by or for the purposes of the Post Office :
or by the Minister of Agriculture and Fisheries under the Contagious Diseases (Animals) Act, 1878,[146] and the Acts amending the same.

The section does not apply to Scotland at all. In the case, however, of rules made under a few Acts of Parliament the enabling Act itself applies the section to Scotland, e.g., the Public Health (Regulations as to Food) Act, 1907.[147]

Notice of a proposal to make any " statutory rule " which is within the scope of the section must be gazetted at least 40 days before the " statutory rule " is made ; and the notice must state where copies of the draft regulation can be obtained.

During the 40 days any public body may obtain copies of the draft rules at a reasonable price, and any representations or suggestions made in writing by a public body interested must be considered by the authority proposing to make the " statutory rule " before it is finally settled.

The practice is for the Department concerned to give notice that the draft is on sale by the Stationery Office and thus in fact the draft can be readily obtained not only by " public bodies " but by anyone interested.

Exclusions from Section 1 of the Act.

It is important to observe that the ambit of Section 1 is strictly defined and that any " statutory rule " which

either is made by one of certain named Departments or for the purposes of the Post Office, or by the Minister of Agriculture and Fisheries under certain Acts, or relates to Scotland,

or—by whomsoever made—is required to be laid before Parliament, or to be laid before Parliament in draft, for a period before taking effect,

or—by whomsoever made—is not required to be laid before Parliament at all

is beyond the ambit of the section.

By subsequent legislation the scope of the section has been further limited. A list of the further exclusions will be found in the Index to the Statutes in Force under the heading " Statutory Rules and Orders, 2. Draft rules in certain cases." On the other hand there has been a slight extension of the section to certain rules theretofore excluded. This extension will be found under the same heading in the Index.

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[146] 41 & 42 Vict., c. 74.

[147] 7 Edw. 7, c. 32.

There is, however, one recent exclusion of rules from the operation of the section which must not be passed over without particular notice. Under sub-section 5 of Section 99 of the Supreme Court of Judicature (Consolidation) Act, 1925,[148] Rules of the Supreme Court—i.e. the whole of the High Court legal procedure—were for the future entirely excluded from the operation of Section 1 of the Rules Publication Act, 1893.[145]

In Northern Ireland the Rules Publication Act, 1893,[145] has been repealed altogether and replaced by the Rules Publication Act (Northern Ireland), 1925, which contains nothing corresponding to Section 1 of the 1893 Act.

Provisional regulations.

But even in the case of statutory rules within the ambit of Section 1, Section 2 provides that where the authority empowered to make the rule certifies that on account of urgency or any special reason a rule should come into immediate operation, the authority may make the rule come into operation forthwith as a provisional rule and continue in force until—though only until—a rule has been made in accordance with the provisions of Section 1.

"It was doubtless intended," says Mr. Carr in "*Delegated* Legislation"[149] "that a Department which could not wait forty days and which therefore made its rules as 'provisional' should convert its provisional rules into substantive rules by the statutory process already described (i.e. in accordance with the provisions of Section 1). This is usually so done. Thus the Ministry of Health, having to issue its regulations under the Census Act, 1920[150] in a hurry, as preparations had to be rapidly made for the 1921 census, certified its regulations as urgent and issued them as 'provisional' on December 21st, 1920, and followed them up by producing draft rules three days later which . . . . came permanently into force on February 14th, 1921. But, once rules have been made 'provisional,' there is no particular incentive to convert them into non-provisional rules."

Some provisional rules of 1911 about old age pensions were reissued in modified form in 1920, but still as provisional rules, and were not superseded by rules in final form till 1921.

In that year, however, a Treasury Circular reminded Government Departments that "provisional rules should in all cases be superseded by rules in final form as early as possible"—a reminder which we endorse.

It should be noticed that

(*a*) there are enactments which specially provide for the exclusion of rules made under those enactments from the ambit of Section 1 of the Rules Publication Act, while making special provision for antecedent publicity

[148] 15 & 16 Geo. 5, c. 49.
[149] Page 35.
[150] 10 & 11 Geo. 5, c. 41.

for such rules, e.g. Section 18 of the Mining Industry Act, 1926,[151] and Section 12 of the Coroners (Amendment) Act, 1926,[152] (see below for the special provision contained in each of these sections);

(*b*) there are enactments on the other hand which expressly provide for the inclusion of rules made under these enactments, which would not apart from such express provision be within the ambit of the section, e.g. the Town Planning Act, 1925.[153]

Publication of regulations.

While Section 1 of the Rules Publication Act, 1893[154] provides for antecedent publicity, Section 3 and Treasury regulations [155] made thereunder provide for subsequent publicity as regards regulations sent to the King's Printer.[156]

Nearly every regulation sent to the King's Printer which is general and not local in character is under existing practice printed forthwith in separate form.[157]

At the end of every year the Stationery Office publishes a volume called " Statutory Rules and Orders," containing the text of nearly all regulations similar to public general Acts and a classified list of local regulations made in the course of the year and still in force.[158].

At the end of every third year it publishes an Index to the " Statutory Rules and Orders " in force.

" The creation of this official system of publication has removed the reproach that the law embodied in statutory rules was less well known and less easy to find than the law embodied in Acts of Parliament."[159]

Special statutory safeguards.

Special safeguards for antecedent publicity are sometimes contained in particular statutes. The following are typical illustrations—

(*a*) the power of the Board of Trade to appoint committees for the purpose of advising them when considering the making or alteration of any rules, regulations or scales for the purpose of the Merchant Shipping Acts, consisting of such persons as they may appoint representing the interests principally affected or having special knowledge of the subject matter :[160]

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[151] 16 & 17 Geo. 5, c. 28.
[152] 16 & 17 Geo. 5., c. 59.
[153] 15 & 16 Geo. 5, c. 16.
[154] 56 & 57 Vict., c. 66.
[155] Regulations, dated August 9th, 1894, made by the Treasury with the concurrence of the Lord Chancellor and the Speaker of the House of Commons in pursuance of the Rules Publication Act, 1893 (1894: No. 734). See Annex No. I.
[156] See above para. 7.
[157] Regulation 8.
[158] Regulation 9.
[159] " Delegated Legislation," page 45.
[160] Merchant Shipping Act, 1906 (6 Edw. 7, c. 48), s. 79.

(*b*) the elaborate provision for publication, consideration of objections, and public inquiry in connection with the making by the Secretary of State of regulations under the Factory and Workshop Act, 1901,[161] which are contained in Sections 80 and 81 of that Act :

(*c*) the elaborate machinery for publication, consideration of objections, and public inquiry in connection with the making by the Minister of Labour of special orders under the Trade Boards Act, 1918,[162] which are contained in the first Schedule to that Act :

(*d*) the similar provisions in connection with the confirmation by the Minister of Transport of special orders made by the Electricity Commissioners under the Electricity (Supply) Act, 1919,[163] which are contained in the Schedule to that Act :

(*e*) the provision in the Seeds Act, 1920,[164] for consultation between the Minister of Agriculture and Fisheries and representatives of the interests concerned before the Minister makes regulations for the purpose of carrying the Act into effect :

(*f*) the provision in the London Traffic Act, 1924,[165] for consultation between the Minister of Transport and the London and Home Counties Traffic Advisory Committee before the Minister makes regulations :

(*g*) the provision in Section 18 of the Mining Industry Act, 1926, for consultation between the Minister of Labour and representative associations before the Minister makes regulations under the section :[166]

(*h*) the provisions in Section 12 of the Coroners' (Amendment) Act, 1926,[167] in connection with orders for the formation or alteration of County Coroners' districts.

Quite apart from the above *statutory* obligations, Departments are naturally at pains to consult freely all interested bodies, where possible, in the ordinary course of running their businesses efficiently.

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[161] 1 Edw. 7, c. 22.
[162] 8 & 9 Geo. 5, c. 32.
[163] 9 & 10 Geo. 5, c. 100.
[164] 10 & 11 Geo. 5, c. 54, s. 7.
[165] 14 & 15 Geo. 5, c. 34, s. 10.
[166] 16 & 17 Geo. 5, c. 28.
[167] 16 & 17 Geo. 5, c. 59.

Drafting of Regulations.

Departmental drafting.

10. There is one aspect of the unsystematized character of our constitutional procedure for delegated legislation to which we wish to draw special attention. Whereas the drafting of Government Bills is done in the Office of the Parliamentary Counsel, barristers selected for that office and by long training therein acquiring the highest skill as draftsmen, the drafting of regulations is only in certain cases (for example, regulations which are made by the Treasury) done by or under the supervision of Parliamentary Counsel. In other cases it is done by the various Departments, usually (though not invariably) by their legal branches. The work is there largely in the hands of persons who, however able and experienced in their own work, do not possess the very special drafting experience of the Parliamentary Counsel. We do not attach so much importance to the fact that occasionally the draftsmen are not lawyers; a man may be either a solicitor or counsel and yet not have had the training which is essential to make a good draftsman, for good draftsmanship is an art which calls for special qualifications and long experience. By it we mean the power of clear, lucid and simple expression of the intended purport of the draft, and of keeping within the legal limitations intended by Parliament. As things stand, under the existing procedure of leaving the drafting of regulations to the Departments the work is uneven—some is good and some is bad. Regulations on the whole tend to be somewhat less well drafted than Government Bills as originally presented to Parliament,[168] which are all drawn in the Office of Parliamentary Counsel. The work of Bill drafting may sometimes suffer even there from the pressure or urgency of Cabinet demands, but that does not touch our principle that drafting is a skilled task and that Parliamentary Counsel have the skill.

The present practice does not merely mean that there is a risk of regulations being less thoroughly drafted and less clearly expressed than Bills as originally presented to Parliament, but that there is an absence of the safeguards afforded by the special skill, training and position of the Parliamentary Counsel, with the inevitable consequence, for instance, of an increased risk of the Minister, on whom the power of making regulations is conferred, assuming to himself, in the terms of the regulations which he makes, powers more extensive than those conferred by the Act under which the regulations are made, and it is said by some critics that this result is not infrequent.

Sir William Graham-Harrison, the Senior Parliamentary Counsel, is of opinion that where Parliament delegates legislative powers, whether to His Majesty in Council, or to a particular

[168] The office of Parliamentary Counsel is obviously not responsible for the final language of the Act when it receives the Royal Assent, in so far as it results from amendments made in Parliament.

Minister, those powers cannot, without express authorisation from Parliament, be passed on by His Majesty in Council or the Minister to any other body or person; and we agree with this view. He has pointed out to us, however, that the principle is not always realised by draftsmen of regulations and—while we do not wish to specify any particular regulation—we have in mind by way of illustration two cases where neglect of the principle has, we are inclined to think, resulted in the making of regulations or orders which for this reason are probably *ultra vires*.

Importance of good drafting.

The importance of good drafting cannot be overemphasised, and the more resort to delegated legislation is practised by Parliament, the more necessary is it that its draftsmanship should be uniformly good. We feel that the existing system of Departmental drafting does not fully ensure that the standard shall in all cases be up to that of the best draftsmanship—or even satisfy a lower test. Prevention is both better and less expensive than cure. If ten cases of *ultra vires* regulations occur to-day, and nine of them would be avoided by a general improvement in the standard of drafting, it is obvious that an important public advantage would be achieved, and one peculiarly relevant to the object of our reference. If we assume that legal proceedings result in two or three of the ten cases, the saving of expense direct and indirect which would result is in itself a public economy. But the value of good drafting is not limited to the avoidance of illegalities. In the ordinary life of the community what is above all important is that legislation, whether delegated or original, should be expressed in clear language.

Suggestions for improvement.

No doubt a general improvement such as we desire may necessitate some increase in staff; but even in present conditions of economic exigency, we are satisfied that the proposal is wise on the ground *inter alia* that it is a measure of economy. The objective might be secured either (1) by a direct increase in the staff of the Parliamentary Counsel's Office or (2) by some scheme for an all-service grade of draftsman who would be available either for work in that office itself or for service in the legal branches of Departments with a great deal of drafting work, and there may be other ways. The first proposal would involve the gradual creation of a central supervising drafting Department which would tend to secure uniformity of practice and would have the effect of applying a wider general experience to the detailed parts of the work; but it would be several years before a sufficient staff could be trained up for such supervision. We do not, however, regard the problem of choosing between the several methods as directly covered by our terms of reference, and therefore make no attempt to appraise their respective advantages and disadvantages.

We think it sufficient to recommend that the whole subject should be taken into immediate consideration by the Departments concerned and the Treasury.

Necessity for Delegation.

11. We have already[169] expressed the view that the system of delegated legislation is both legitimate and constitutionally desirable for certain purposes, within certain limits, and under certain safeguards. We proceed to set out briefly—mostly by way of recapitulation—the reasons which have led us to this conclusion :—

Pressure on Parliamentary time.

(1) Pressure upon Parliamentary time is great. The more procedure and subordinate matters can be withdrawn from detailed Parliamentary discussion, the greater will be the time which Parliament can devote to the consideration of essential principles in legislation.

Technicality of subject matter.

(2) The subject matter of modern legislation is very often of a technical nature. Apart from the broad principles involved, technical matters are difficult to include in a Bill, since they cannot be effectively discussed in Parliament. As an illustration we invite attention to the Safeguarding of Industries (Exemption) No. 5 Order, 1931, printed as Annex III to this Report.

Unforeseen contingencies.

(3) If large and complex schemes of reform are to be given technical shape, it is difficult to work out the administrative machinery in time to insert in the Bill all the provisions required; it is impossible to foresee all the contingencies and local conditions for which provision must eventually be made. The National Health Insurance Regulations, and the Orders setting up Trade Boards, illustrate particularly well this aspect of the problem.

Flexibility.

(4) The practice, further, is valuable because it provides for a power of constant adaptation to unknown future conditions without the necessity of amending legislation. Flexibility is essential.[170] The method of delegated legislation permits of the rapid utilisation of experience, and enables the results of consultation with interests affected by the operation of new Acts to be translated into practice. In matters, for example, like mechanical road transport, where technical development is rapid, and often unforeseen, delegation is essential to meet the new positions which arise.

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[169] Section I, paragraph 5.

[170] There is a very early instance of this which is still in force. 11 Richard II, c. 11, refers to an earlier Act of 6 Richard II, c. 5, which had enacted that Assizes should be held in the principal and chief towns in the counties where Shire Courts were held. The Act of 11 Richard II says that the Act of 6 Richard II has been found prejudicial and grievous. It authorises the Lord Chancellor, therefore, to vary the provisions "notwithstanding the said statute". This, therefore, is an early instance of power to vary an Act. This power under 11 Richard II lived on and was acted upon until it was repealed and replaced by the Assizes Act, 1833 (3 & 4 Will. IV, c. 71), which in turn has been replaced by the Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49, s. 72).

Opportunity for experiment.

(5) The practice, again, permits of experiment being made and thus affords an opportunity, otherwise difficult to ensure, of utilising the lessons of experience. The advantage of this in matters, for instance, like town planning, is too obvious to require detailed emphasis.

Emergency Powers.

(6) In a modern State there are many occasions when there is a sudden need of legislative action. For many such needs delegated legislation is the only convenient or even possible remedy. No doubt, where there is time, on legislative issues of great magnitude, it is right that Parliament itself should either decide what the broad outlines of the legislation shall be, or at least indicate the general scope of the delegated powers which it considers are called for by the occasion.

But emergency and urgency are matters of degree; and the type of need may be of greater or less national importance. It may be not only prudent but vital for Parliament to arm the executive Government in advance with almost plenary power to meet occasions of emergency, which affect the whole nation—as in the extreme case of the Defence of the Realm Acts[171] in the Great War, where the exigency had arisen; or in the less extreme case of the Emergency Powers Act, 1920,[172] where the exigency had not arisen but power was conferred to meet emergencies that might arise in the future. The recent emergency statutes mentioned above in paragraph 8 (B) (i) afford other illustrations of the necessity of this method of legislation where there is thought to be need of giving to the Government power to take very rapid decisions which to be effective must possess the force of law. There is in truth no alternative means by which strong measures to meet great emergencies *can* be made possible; and for that reason the means is constitutional.

But the measure of the need should be the measure alike of the power and of its limitation. It is of the essence of constitutional Government that the normal control of Parliament should not be suspended either to a greater degree, or for a longer time, than the exigency demands.

Degrees of emergency.

We end these observations with a truism. Emergencies are exceptional: and exceptions cannot be classified in general language. We therefore make no attempt, beyond stating the principle above mentioned, to lay down any general rules about the delegation by Parliament to the Executive of powers to legislate on occasions of emergency. It may suffice for purposes of more limited exigency to arm particular Departments of State with power to pass emergency regulations for dealing with specific difficulties suddenly arising and calling for instant preventive or

[171] The earlier Acts were replaced by the consolidating and amending Act (5 & 6 Geo. 5, c. 8).

[172] 10 & 11 Geo. 5, c. 55.

remedial steps in their special field of administration. Epidemics are a good example of the latter need; and we may recall that as far back as 1832 an Act[173] passed in consequence of an outbreak of cholera gave the Privy Council power to make general regulations to prevent the spread of the disease. Similarly at the present time the Minister of Agriculture has extensive powers under the Diseases of Animals Acts 1894[174] to 1927[175] to make orders for preventing and checking diseases of animals and for preventing their introduction into Great Britain; of which a striking recent example is the Animals (Importation) Order 1930.[176]

Summary of Arguments of the critics of Delegated Legislation.

12. For these reasons a system of delegated legislation is indispensable. Indeed the critics of the system do not seek to deny its necessity in some form. Their complaint lies rather against the volume and character of delegated legislation than against the practice of delegation itself; and in so far as they base their complaints on criticism of the administration as such, we doubt whether they are clearly conscious of any distinction between the legislation of Parliament itself and the delegated legislation of Ministers. We agree with them in thinking that there are real dangers incidental to delegated legislation; and we think it may be convenient to summarize the main criticisms, although we do not thereby commit ourselves to complete concurrence with the critics. Our views of the dangers, and of the possibility of adequate safeguards against them, are indicated in the recommendations which we make in paragraphs 14 and 15.

Skeleton legislation.

(1) Acts of Parliament may be passed only in skeleton form and certain only the barest general principles. Other matters of principle, transcending procedure and the details of administration, matters which closely affect the rights and property of the subject, may be left to be worked out in the Departments, with the result that laws are promulgated which have not been made by, and get little supervision from Parliament. Some of the critics suggest that this practice has so far passed all reasonable limits, as to have assumed the character of a serious invasion of the sphere of Parliament by the Executive. The extent of its adoption is, they argue, excessive, and leads not only to widespread suspicion and distrust of the machinery of Government, but actually endangers our civic and personal liberties.

Inadequate scrutiny in Parliament.

(2) The facilities afforded to Parliament to scrutinise and control the exercise of powers delegated to Ministers are inadequate. There is a danger that the servant may be transformed into the master.

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[173] 2 & 3 Will. IV, c. 10.
[174] 57 & 58 Vict., c. 57.
[175] 17 & 18 Geo. 5, c. 13.
[176] S.R. & O., 1930, No. 922.

The rights of the subject.

(3) Delegated powers may be so wide as to deprive the citizen of protection by the Courts against action by the Executive which is harsh, or unreasonable.

Loosely defined powers.

(4) The delegated power may be so loosely defined that the area it is intended to cover cannot be clearly known, and it is said that uncertainty of this kind is unfair to those affected.

Difficulty of ensuring full publicity.

(5) While provision is usually made

(*a*) for reasonable public notice, and

(*b*) for consultation in advance with the interests affected, where they are organized,

this is not always practicable, particularly where the public affected is general and not special and organized.

Difficulty of obtaining redress.

(6) The privileged position of the Crown as against the subject in legal proceedings places the latter at a definite disadvantage in obtaining redress in the Courts for illegal actions committed under the authority of delegated legislation.[177]

The question remains one of safeguards.

Each of these criticisms is important, but they do not destroy the case for delegated legislation. Their true bearing is rather that there are dangers in the practice; that it is liable to abuse; and that safeguards are required. Nor do we think that either the published criticisms or the evidence we have received justifies an alarmist view of the constitutional situation. What the system lacks is coherence and uniformity in operation. Its defects, as we have sought to show, are the inevitable consequence of its haphazard evolution. Our recommendations are intended to remove these defects; and we believe that they should go far to meet the difficulties which the critics have indicated. For the most part the dangers are potential rather than actual; and the problem which the critics raise is essentially one of devising the best safeguards.

Drafting and Interpretation of Statutes.

Results of obscurity in statutes.

13. From time to time strong expressions of opinion have fallen from our judges upon the drafting of some of our statutes. It has been said that the language of the particular provision is ambiguous and its meaning obscure: or that the method of legislation by reference is bound to create confusion. No doubt there is occasional cause for such criticism. And equally undoubted is the inevitable consequence of such ambiguities—that occasionally the meaning

[177] We consider in Section III the bearing upon our terms of reference of the whole subject of the existing limitations, recognised by the law of England (and Scotland must be distinguished) upon the subject's right of redress against the Crown. The point has some relevance here, but a reference to Section III will suffice for present purposes.

which the Court discerns in the language used is not in fact the meaning which Parliament intended it to bear. And from this occasional consequence some students of politics have been tempted to doubt the suitability of the legal mind to interpret the statutory intention of a democratic Parliament bent on social legislation of a far-reaching and often novel character."[177a] We mention this attitude towards the Law Courts because we think a certain section of public opinion may be disposed to adopt it. But in truth those who so think mistake the cause. It is not that the legally trained mind is prone to mis-interpret social legislation, but that the language of the legislation is not always clear enough to prevent the risk of mis-interpretation. Consequently the remedy to which that section of public opinion seems to lean of entrusting the interpretation of such statutes to administrative officers in the civil service would not cure

[177a] Those who believe that the alleged failure of the Courts to give effect to the true intentions of Parliament is due to their want of sympathy with democratic legislation may be recommended to study the cases of *Ellerman Lines, Ltd.* v. *Murray* and *White Star Line, etc., Co.* v. *Comerford*, 1930 p. 197; 1931 A.C. 126, in which Lord Merrivale (who tried the actions) the Court of Appeal and the House of Lords all held that under section 1 of the Merchant Shipping (International Labour Conventions) Act, 1925 (15 & 16 Geo. 5, c. 42) a seaman whose service had been prematurely terminated by the wreck or loss of the ship was entitled to receive wages at the rate payable under his agreement of service for each day on which he was in fact unemployed during a period of two months from the date of the termination of the service, whether his service under the agreement would in the normal course have terminated before the expiration of that period or not; unless the owner showed that the unemployment was not due to the wreck or loss of the ship or that the seaman was able to obtain suitable employment. The Act purported to give effect to a certain draft Convention adopted by the International Labour Conference and set forth in Part I of the First Schedule of the Act and both Lord Justice Slesser, who dissented in the Court of Appeal, and Lord Blanesburgh who dissented in the House of Lords, were of opinion that the Convention imposed no liability on the owner for days of unemployment subsequent to the date on which the seaman's contract of employment would but for the wreck have terminated. Lord Blanesburgh said in the course of his opinion (1931 A.C. 143-4) that the effect of the decision was that Parliament, under no international obligation in that behalf, in a statute which contained no hint of any such intention, had gratuitously gone out of its way to impose on an owner a liability to a seaman for wages for which he had never contracted and, apart from the statute, was under no conceivable liability to pay. " Nor," he added, " is that all; for he is to have no return for the payments so to be made and Parliament has chosen as the occasion for imposing upon him this liability (in relief, it would seem, if the respondent Comerford's case may be regarded as typical, of the Unemployment Insurance Fund, to which he has already contributed) the moment when the owner is already confronted with the total loss of his ship." But in the result there were seven judicial opinions against two that it would not be proper to resort to the draft Convention for the purpose of giving to the section a meaning other than that which was its natural meaning.

the disease. The interpretation of written documents, whether statutes, contracts, or wills, requires the trained legal mind. To ask the layman to perform the task just when *ex hypothesi* the risk of ambiguity makes it difficult is to make the remedy worse than the disease. That judges are human and sometimes make mistakes is irrelevant. The layman will make more.

We make these observations because on the whole subject of our reference public opinion is confused. That there are troubles which call for diagnosis, and when understood are seen to require safeguards, we recognize, as appears from our whole report. But troubles due to the imperfections which, avoidably or unavoidably, are from time to time allowed still to disfigure our Parliamentary drafting at the moment when the Bill ripens into an Act are not due to any of the causes which fall within our terms of reference; and we only call attention to them because we believe that they have unconsciously affected public opinion, which has vaguely but erroneously assigned their effects to the wrong causes.

The lines of improvement.

The true remedy for such troubles is to be sought along the line indicated by us in para. 10 in relation to the drafting of delegated legislation, viz., the strengthening of the Parliamentary Counsel's office, so that its staff should be less over-worked at times of pressure. The principles of statute interpretation are clear and well-known: and with that knowledge there must go hand in hand the draftsman's art which is understood in that office. Similar observations of course apply equally to the alternative policy of strengthening the staff of Departmental draftsmen which we have considered in the same paragraph.

Principles of interpretation.

The principles of interpretation are so important, directly and indirectly, in connection with our subject that we conclude this paragraph with a statement upon them. We shall have occasion in the course of Section III to animadvert upon the distinction, so familiar to lawyers, between issues of fact and issues of law. If there is a dispute as to the meaning of a statute this is an issue of law. The words of a statute affecting the rights of individuals under public law must be interpreted in the same way as the words of a contract affecting their private rights. The intention of the parties and the intention of the Legislature are alike to be ascertained from the words that are used and these words are to be construed in their plain natural sense unless the context imposes some other meaning upon them. If there is any doubt as to the meaning of words in a statute " it has always been held a safe means of collecting the intention to call in aid the ground and cause of making the statute and to have recourse to the preamble which according to Chief Justice Dyer is a key to open the mind of the makers of the Act and the mischiefs which they intended to redress " : see the Sussex Peerage case, 11 Clark and Finelly, at p. 143. Reference may also

be made to Lord Blackburn's judgment in *River Wear Commissioners* v. *Adamson*, reported in 2 A.C., 743 at pages 763-5 :

" I shall therefore state, as precisely as I can, what I understand from the decided cases to be the principles on which the Courts of Law act in construing instruments in writing ; and a statute is an instrument in writing. In all cases the object is to see what is the intention expressed by the words used. But, from the imperfection of language, it is impossible to know what that intention is without inquiring farther, and seeing what the circumstances were with reference to which these words were used, and what was the object, appearing from those circumstances, which the person using them had in view ; for the meaning of words varies according to the circumstances with respect to which they were used. But it is to be borne in mind that the office of the Judges is not to legislate, but to declare the expressed intention of the Legislature, even if that intention appears to the Court injudicious ; and I believe that it is not disputed that what Lord Wensleydale used to call the golden rule is right, viz., that we are to take the whole statute together, and construe it all together, giving the words their ordinary signification, unless when so applied they produce an inconsistency, or an absurdity or inconvenience so great as to convince the Court that the intention could not have been to use them in their ordinary signification and to justify the Court in putting on them some other signification which, though less proper, is one which the Court thinks the words will bear. In *Allgood* v. *Blake* (L.R. 8 Ex. at page 163), in the judgment of the Exchequer Chamber (which I had the honour to deliver) as to the construction of a will, it is said :

' The great difficulty in all cases is in applying these rules to the particular case ; for to one mind it may appear that an effect produced by construing the words literally is so inconsistent with the rest of the will, or produces an absurdity or inconvenience so great, as to justify the Court in putting on them another signification, which to that mind seems a not improper signification of the words ; whilst to another mind the effect produced may appear not so inconsistent, absurd, or inconvenient as to justify putting any other signification on the words than their proper one, and the proposed signification may appear a violent construction. We apprehend that no precise line can be drawn, but that the Court must, in each case, apply the admitted rules to the case in hand, not deviating from the literal sense of the words without sufficient reason, or more than is justified, yet not adhering slavishly to them when to do so would obviously defeat the intention which may be collected from the whole will.' My Lords, *mutatis mutandis*, I think this is applicable to the construction of statutes as much as wills. And I think it is correct."

Consideration of the particular steps to be taken to improve the drafting of statutes is outside our terms of reference. We are so impressed with the difficulties inherent in the Parliamentary task under the actual conditions of legislation, that we have ventured to refer to certain aspects of those difficulties. What we have said in this paragraph is in truth incidental to our diagnosis of the mischiefs covered by our terms of reference.

Opinions and conclusions of the Committee.

14. We are now in a position to summarise our opinions and to describe the safeguards which we consider necessary.

Inevitability of delegated legislation.

(*a*) We have already expressed in the immediately preceding paragraphs our view that the delegation of legislative powers is legitimate for certain purposes, within certain limits, and under certain safeguards. It is plain that it is in fact inevitable.

Dangers to be guarded against.

(*b*) The practice of delegating legislative powers to Ministers of the Crown grew without system. The result is such as must always be expected from unsystematic growth.

We believe that the dangerous tendencies, which we observe, and desire to see restrained, are due to the absence of system and the lack of direction. While we are of opinion that Parliament has been right to delegate legislative powers to Ministers of the Crown, we are equally of opinion that the methods by which those powers have been delegated are open to serious criticism.

We think that Parliament has contributed to the abuses of delegated legislation by paying insufficient attention to the importance of clear and consistent terminology. The use of different words in the same sense and the same word in different senses is bound to cause confusion.

Principles to be followed.

But a clear and consistent use of the English language is not enough, if Parliament is to keep an effective control over Ministers and their Departments in the exercise of their delegated law-making powers. We have drawn attention to the differences which we have observed between what we have called the normal and the exceptional practice of Parliament. We doubt whether Parliament itself has in the past been aware of the difference, but we venture to express a hope that in the future Parliament will be more conscious both of the principles at stake and of the safeguards needed; that whenever legislative power is delegated, the limits of the power will be clearly defined in the statute by which it is delegated; that Parliament will not depart from the normal into the exceptional type of delegated legislation without special need, nor without conscious consideration of the special grounds put

forward as constituting the need; and that it will grant delegated powers of the exceptional type—e.g. powers to legislate on matters of principle or to impose taxation—only on exceptional grounds.

The so-called "Henry VIII Clause."

(c) There can be no doubt of the extreme convenience, from the point of view of those charged with the duty of bringing into effective operation a far reaching measure of reform, of a dispensing power such as that contained in the so-called "Henry VIII Clause" (*see* paragraph 8 B (ii) on page 36. But again the argument of convenience may be pushed too far. Even though it may be admitted that Parliament itself has conferred these powers upon Ministers, and must be presumed to have done so with the knowledge of what it was doing, it cannot but be regarded as inconsistent with the principles of Parliamentary government that the subordinate law-making authority should be given by the superior law-making authority power to amend a statute which has been passed by the superior authority. It is true that the power has been sparingly used[178] and that it has been used with the best possible motives. It may also be that the exercise of the power has not, in practice, given ground for complaint. None the less, it is a power which may attract the hostility and suspicion of persons affected by its exercise, who, if they are aggrieved by a particular exercise of the power, are tempted to impute to those who exercise it motives which do not in fact exist.

We dispose, in passing, of the suggestion, unsupported as it is by the smallest shred of evidence, that the existence of such provisions in certain Acts of Parliament is due directly or indirectly to any attempt or desire on the part of members of the permanent Civil Service to secure for themselves or for their Departments an arbitrary power. All that may be justly inferred from the facts is, that Ministers have in certain instances regarded the inclusion of provisions of this kind as essential to the successful operation of measures which they were proposing to Parliament. The power has been asked for and granted but rarely, and always subject to conditions limiting the period of its operation and defining the

[178] Illustrations of the actual use of the clause so far as concerns such of those Acts as concern the Minister of Health will be found in the Ministry of Health memorandum (see first of the companion volumes to this Report). It will be noted that under the latest of the Acts, the Local Government Act of 1929 (19 & 20 Geo. 5, c. 17 (see Section 130), only one order was made, namely, the Local Government (Bootle Water Rate) Order, 1929. This order deals with an exceptional situation which arose in connection with the County Boroughs of Liverpool and Bootle as the result of local legislation under which the Liverpool Corporation provide Bootle with water and themselves levy and collect a water rate chargeable on property in Bootle. The order was required to make it clear that the derating provisions apply to this rate.

purposes for which it may be used.[179] Even with safeguards such as these, it is clearly a power which in theory at any rate may be unscrupulously used.

We have been assured that the National Insurance Act, 1911[180] could never have been brought into operation without the powers conferred by the clause[181] and that if all the powers subsequently obtained under the clause had had to be included in the Bill, it could never have passed into law within any reasonable period. This may well be the case; but a critic naturally asks whether that which was done by regulation under the clause after the Bill became an Act could not, when the need was discovered, have been expressed in a new Bill reintroduced in the next Session. Apart from exigencies arising from party politics, it would seem that if it does prove necessary in the public interest to amend an Act of Parliament, for such a reason, and the matter is of sufficient political urgency, Parliamentary time can be found, particularly with the aids available under Standing Orders to curtail debate on matters which have after full debate been settled in the Division Lobby in the same or preceding Session.

It is significant that the so-called "Henry VIII clause" has not been included in all statutes where, upon the arguments advanced in its favour, it might have been used. For example, no such provision is to be found in the Land Drainage Act, 1930,[182] which provides for the reorganisation of a complicated system of local administration dating from the Middle Ages. If it has been found possible to bring certain important and complicated legislative schemes into operation without such a power, relying upon the ordinary method of an amending Bill in Parliament to meet unexpected contingencies, it is not clear why other enactments (mainly those connected with local government) cannot similarly be dealt with.

It is probable that, if this provision were no longer used, the operation of certain large measures of reform would be somewhat delayed. Bills would take longer to prepare, and once the Act was in operation any defect in its provision could not be remedied until amending legislation had been passed. This price, however, may be worth paying, if there is anything in the view that the

[179] In the course of the Debates on the National Health Insurance Bill in the House of Commons in 1911, statements were made by Ministers in charge of the Bill that the procedure of the Henry VIII Clause had been used "again and again in innumerable Acts of Parliament similar to this" (Mr. McKenna, on 10 November, 1911, Official Report, 5th Series, Vol. XXX, col. 2011), and that these powers had been "in all recent Acts" (Mr. Lloyd George, ibid., col. 2016). We think the Ministers were under a misapprehension as the Clause had been used seldom, and we believe that our list in the Annex is nearly exhaustive.

[180] 1 & 2 Geo. 5, c. 55.

[181] s. 78.

[182] 20 & 21 Geo. 5, c. 44 (but see s. 41 for modification of local Acts).

mere existence of the power has aroused suspicion and hostility against the machinery of government as it exists, and may well continue to do so in an increasing degree : and that it is a standing temptation to Ministers and their subordinates either to be slipshod in the preparatory work before the Bill is introduced in Parliament or to attempt to seize for their own Departments the authority which properly belongs to Parliament.

As realists we recognise that the party system must qualify to some extent what we have just said.

Necessary limits on the clause

The National Insurance Act, 1911[180] may serve as an illustration. We have been told—rightly or wrongly—that if that Bill had not passed into law in 1911, the chances of it passing the Parliamentary ordeal with success in 1912 or 1913 would have been small; with the result that a social measure which its enemies, as well as its friends, must admit is one of far-reaching importance would probably never have been passed at all. In other words the practical politician has to seize the tide when it serves or may lose his venture. We admit this truth : and because we admit it, we consider that the Henry VIII clause is a political instrument which must occasionally be used. But for this reason, we are clear in our opinion first that the adoption of such a clause ought on each occasion when it is, on the initiative of the Minister in charge of the Bill, proposed to Parliament to be justified by him up to the hilt and that secondly its use should be avoided unless demonstrably essential. It can only be essential for the limited purpose of bringing an Act into operation and it should accordingly be in most precise language restricted to those purely machinery arrangements vitally requisite for that purpose; and the clause should always contain a maximum time limit of one year after which the powers should lapse. If in the event the time limit proves too short—which is unlikely—the Government should then come back to Parliament with a one clause Bill to extend it.

Judicial control over delegated legislation.

(*d*) We reported in paragraph 8 at page 41 our objection to the use in Acts of Parliament of clauses purporting to enact that the mere making of a regulation by a Minister under the Act should be " conclusive evidence " that in doing so he had not exceeded his statutory power. We are of opinion that in delegating legislative functions to a Minister, Parliament should be careful to preserve in all but the very exceptional cases, which we describe below, the jurisdiction of the Courts of Law to decide whether in any purported exercise of those functions the Minister has acted within the limits of his delegated power. The rule of law requires that all regulations should be open to challenge in the Courts except when Parliament deliberately comes to the conclusion that it is essential in the public interest to create an exception and to confer on a Minister the power of legislating with immunity from

challenge. We recognise that such exceptions must be created in cases where finality is desirable, e.g., where power is given to a Minister to make law upon the faith of which titles to property may be created or money may be raised, e.g., Stock Regulations, or upon which marriages may be solemnized, e.g., Regulations under the Foreign Marriage Act, 1892.[183] But we are of opinion that when for such reasons the regulation cannot remain indefinitely open to challenge, there should be an initial period of challenge of at least three months and preferably six months.[184] Apart from emergency legislation, we hardly think there can be any case so exceptional in its nature, as to make it both politic and just to prohibit the possibility of challenge altogether.

Simplification of legal procedure.

We would direct attention to the fact that procedure by way of *certiorari*, *prohibition* and *mandamus* is archaic and in some ways cumbrous and inelastic, and we would suggest the expediency of introducing a simpler, cheaper and more expeditious procedure. We revert to this topic in Section III of our Report, paragraph 12.

New Rules Publication Bill suggested.

(*e*) We are of opinion that while the Rules Publication Act, 1893,[185] has worked well within its sphere of application, the time has come to repeal it and replace it by a simpler and more comprehensive measure on the lines which we recommend in paragraph 15 below.

Suggested creation of special Standing Committees of both Houses.

(*f*) We are convinced that no system of antecedent publicity, however effective, can relieve the two Houses of Parliament of the duty of exercising an effective supervision over delegated legislation themselves.

We are equally convinced that at the present time Parliamentary control over delegated legislation is defective in two respects :—

(i) Legislative powers are freely delegated by Parliament without the members of the two Houses fully realising what is being done;

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[183] 55 & 56 Vict., c. 23.

[184] The validity of clearance orders and compulsory purchase orders, confirmed by the Minister of Health under Section 11 of the Housing Act, 1930 (20 & 21 Geo. 5, c. 39), is subject to challenge in the High Court within six weeks after the publication of the notice of confirmation (subsection 3), and subsection 4 provides that, with this exception, an order shall not, either before or after its confirmation, be questioned by "*prohibition* or *certiorari* or in any legal proceedings whatsoever". We believe that this was the first time, in an Act of permanent application, that a definite period of challenge was allowed. A similar right of challenge within a limited period was given in the case of compulsory purchase orders under Part III of the Schedule to the Public Works Facilities Act, 1930 (20 & 21 Geo. 5, c. 50), and as this was a temporary Act the period was there limited to 21 days, because the schemes dealt with were regarded as urgent.

[185] 56 & 57 Vict., c. 66.

(ii) although many of the regulations made in pursuance of those powers are required to be laid before both Houses and in fact are so laid, there is no automatic machinery for their effective scrutiny on behalf of Parliament as a whole; and their quantity and complexity are such that it is no longer possible to rely for such scrutiny on the vigilance of private Members acting as individuals. A system dependent on human initiative is liable to break down, and the best security for the effective working of any system is machinery which is automatic in its action.

We have, therefore, arrived at the conclusion that the time has come to establish in each House a Standing Committee charged with the duty of scrutinising—

(i) every Bill, containing any proposal for conferring legislative powers on Ministers, as and when it is introduced;
(ii) every regulation, made in the exercise of such powers and required to be laid before Parliament, as and when it is laid.

We desire to make it clear that in no case do we contemplate that the Committee should go into the merits of either the Bill or the regulation.

The sole object of the Committee as conceived by us would be to inform the House in the one case of the nature of the legislative powers which it was proposed to delegate and of the general characteristics of the regulation in the other.

In other words the task of the Committee would not be to act as critic or censor of the substantive proposals in either case, but to supply the private Member with knowledge which he lacks at present, and thus enable him to exercise an informed discretion whether to object or criticise himself.

There would, therefore, be no question in the case of a regulation of doing the work of the Government Department responsible for the regulation over again or of rehearing interested parties.

The number of Bills and regulations which each Committee would have to scrutinise in the course of a Session would, no doubt, be considerable; but the preliminary work would be done by the Clerks of the House attached to the Committee; and with their assistance and the co-operation of the Government Departments responsible for, or affected by, the Bills and the regulations and (subject to the consent of the Lord Chairman and the Speaker respectively) the skilled advice in a consultative capacity of Counsel to the Lord Chairman of Committees for the Lords Committee, and Counsel to the Speaker for the Commons Committee the task of each Committee should not be either burdensome or difficult.

In regard to Bills the task of the Committee would be facilitated if the Bill were accompanied on presentation by a Memorandum

by the Minister or private Member presenting the Bill in which he explained the proposals for the delegation of legislative powers which the Bill contained, and drew attention to their scope, pointing out whether they were of the normal or exceptional kind, and whether the clause was in accordance with precedent in scope and language, and gave his reasons justifying the proposed delegation. We regard this point of procedure as sufficiently important to be formulated in Standing Orders. The statement of reasons would involve the merits of the Bill, and would be more for the benefit of the members of the House generally than of the suggested Standing Committee.

Except for such regulations as required an affirmative resolution as a condition of their validity, the interposition of scrutiny by the Committees would not affect the date of the operation of a regulation; and for Bills and such regulations as required affirmative resolution we do not believe that any serious delay would be entailed.

Recommendations in regard to delegated legislation.

15. We therefore desire to make the following specific recommendations :—

Simplification of nomenclature.

I. The expressions " regulation " " rule " and " order " should not be used indiscriminately in statutes to describe the instruments by which law-making power conferred on Ministers by Parliament is exercised. The expression " regulation "[186] should be used to describe the instrument by which the power to make substantive law is exercised, and the expression " rule " to describe the instrument by which the power to make law about procedure is exercised. The expression " order " should be used to describe the instrument of the exercise of (A) executive power, (B) the power to take judicial and quasi-judicial decisions.[187]

[186] In these recommendations the words " regulation "' and " rule " are so used.

[187] We realise the natural disinclination to change so hallowed a name as " Order in Council ": and we recognise the propriety and desirability of keeping it for prerogative Orders in Council which are original and not delegated legislation, but we suggest that statutory Orders in Council should be known henceforth as " Regulations in Council ".

There is one exception of principle which we favour for reasons of convenience. When a Minister under statutory powers " appoints " a day for an Act to come into force, he does what is in theory a legislative act; but the word " regulation " is inappropriate and we recognise that to retain the word " order " is in accordance with common sense. So when a Minister " confirms " a scheme he may appropriately be spoken of as making an order. But the distinction we seek to draw is obvious and we need not enlarge further. There are also various cases where the act of a Minister is mainly executive, or mainly judicial, although in analysis it has a legislative aspect. Here again the word " order " is appropriate.

II. The precise limits of the law-making power which Parliament intends to confer on a Minister should always be expressly defined in clear language by the statute which confers it: when discretion is conferred, its limits should be defined with equal clearness. *Powers should be clearly defined.*

III. The use of the co-called "Henry VIII Clause," conferring power on a Minister to modify the provisions of Acts of Parliament (hitherto limited to such amendments as may appear to him to be necessary for the purpose of bringing the statute into operation) should be abandoned in all but the most exceptional cases, and should not be permitted by Parliament except upon special grounds stated in the Ministerial Memorandum attached to the Bill (see Recommendation No. XIII); *"Henry VIII clause" should be exceptional.*

IV. The "Henry VIII clause" should *Limits on the clause if used.*

(*a*) never be used except for the sole purpose of bringing an Act into operation;

(*b*) be subject to a time limit of one year from the passing of the Act.

V. The use of clauses designed to exclude the jurisdiction of the Courts to enquire into the legality of a regulation or order should be abandoned in all but the most exceptional cases, and should not be permitted by Parliament except upon special grounds stated in the Ministerial Memorandum attached to the Bill (see Recommendation No. XIII). *Exclusion of the jurisdiction of the Courts should be exceptional.*

VI. Whenever Parliament determines that it is necessary to take the exceptional course mentioned in the last recommendation and to confer on a Minister the power to make a regulation whose validity is not to be open to challenge in the Courts— *Limits on such exclusion.*

(*a*) Parliament should state plainly in the statute that this is its intention;

(*b*) a period of challenge of at least three months and preferably six months should be allowed.[185] Apart from emergency legislation, we doubt if there are any cases where it would be right to forbid challenge absolutely.

VII. Except where immunity from challenge is intentionally conferred, there should not be anything in the language of the statute even to suggest a doubt as to the right and duty of the Courts of Law to decide in any particular case whether the Minister has acted within the limits of his power. *The right and duty of the Courts.*

[185] The Housing Act, 1930 (20 & 21 Geo. 5, c. 39), introduced into Parliament and passed during the sittings of your Lordship's Committee, contains in Section 11 provisions which satisfy the requirements and conditions recommended by us above.

Suggestions for new Rules Publication Act.

VIII. The Rules Publication Act, 1893,[189] should be amended in the following respects :—

(*a*) The anomalous exceptions to Section 1 (in regard to antecedent publicity) should be removed, so that the section will apply to every exercise of a law-making power conferred by Parliament of so substantial a character that Parliament has required the rule or regulation to be laid before it, whoever may be the rule-making authority concerned and whether the rule or regulation comes into operation before being laid, or not :

(*b*) A rule-making authority making provisional regulations or rules should at the same time initiate the normal procedure under Section 1, and the provisional regulations or rules should not remain in force for more than some specified time after the expiration of the period reasonably required for applying the procedure under Section 1 :

(*c*) Section 3 (in regard to official registration and publication) should apply to provisional regulations and rules :

(*d*) Publication—possibly in the Gazette—should be a condition precedent to the coming into operation of a regulation, although in the case of a regulation which has been published in draft in compliance with Section 1 and is ultimately made substantially in the form in which it has been published, a public notification of the making might be substituted for publication of the text.

(*e*) The Documentary Evidence Acts, 1868-1895[190] should be applied to all officially registered statutory rules and orders so that any of these documents would then automatically prove itself in a Court of Law.

General applicability of new Act.

IX. Except in a very special case no future statute should provide for the exclusion of regulations made thereunder from the ambit of the new Rules Publication Act, which we propose, or from any of its provisions.

Consultation with those concerned.

X. The system of the Department consulting particular interests specially affected by a proposed exercise of law-making power should be extended so as to ensure that such consultation takes place whenever practicable.

Explanation of new regulations.

XI. The Departmental practice of appending to a regulation or a rule in certain cases a note explaining the changes made thereby in the law etc., should be extended.

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[189] 56 & 57 Vict., c. 66.
[190] 31 & 32 Vict., c. 37; 45 & 46 Vict., c. 9; 58 & 59 Vict., c. 9.

XII. Except when Parliament expressly requires an affirmative resolution, there should be uniform procedure in regard to all regulations required to be laid before Parliament, namely that they should be open to annulment—not modification—by resolution of either House within 28 days on which the House has sat, such annulment to be without prejudice to the validity of any action already taken under the regulation which is annulled. The resolution itself should *ipso facto* annul.[191] *Standardisation of procedure for laying before Parliament.*

XIII. Standing Orders of both Houses should require that every Bill presented by a Minister which proposes to confer law-making power on that or any other Minister should be accompanied by a Memorandum drawing attention to the power, explaining why it is needed and how it would be exercised if it were conferred,[192] and stating what safeguards there would be against its abuse. *Explanatory Memorandum with Delegating Bills.*

We should like to see this procedure applied also to Bills presented by private Members, but we express no opinion on the question whether that course is practicable, and merely submit the point for consideration of each House.

XIV. Standing Orders of both Houses should require that a small Standing Committee should be set up in each House of Parliament at the beginning of each Session for the purpose of— *Proposed Standing Committee of each House: suggestions for procedure.*

(A) considering and reporting on every Bill containing a proposal to confer law-making power on a Minister:

(B) considering and reporting on every regulation and rule made in the exercise of delegated legislative power, and laid before the House in pursuance of statutory requirement.

(A) The procedure in the case of a Bill might be as follows: *A (Bills).*

Every Bill containing any such proposal would stand referred to the Committee as soon as read a first time. The Committee would consider the proposal as soon as possible and would, as soon as it had completed its consideration of the Bill, report to the House. It should be the duty of the Committee to consider the form only and not the merits of the Bill and it would report upon its form and whether it was wholly normal or in any respect exceptional and in particular—

(1) whether the precise limits of the power were clearly defined:

(2) whether any power to legislate on any matter of principle or to impose a tax was involved in the proposal:

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[191] Section 58 of the Housing Act, 1930 (20 & 21 Geo. 5, c. 39) affords a good precedent in point of form for the type of provision we contemplate.

[192] e.g., a condition of approval by Treasury, what publication, whether consultative committee, &c.

(3) whether any power to modify the provisions of the Bill itself or any existing Statute was involved in the proposal :

(4) whether there was any express proposal to confer immunity from challenge on any regulation which might be made in exercise of the power and, if so, whether a period of challengeability was proposed and, if so, how long a period :

(5) whether, if there was no such express proposal, there appeared to be any doubt that any such regulation or rule would be open to challenge in the Courts on the ground that it was *ultra vires :*

(6) whether the proposals in fact contained in the Bill were consistent with and sufficiently explained by the Memorandum of the Minister attached to the Bill :

(7) whether there appeared to be anything otherwise exceptional about the proposal.

The Report of the Committee would be printed under Standing Orders. Subject to what we say below, it would not, without a suspension of Standing Orders, be in order to move the second reading of the Bill, or at any rate to open the Committee stage, until the space of say seven clear days after the Report of the Committee had been printed and circulated to the House. The kind of procedure we have in mind under revised Standing Orders is that the reception of the Report of the Standing Committee should be a condition precedent to further progress of the Bill, subject always to a power in the Lord Chancellor in the Lords and Mr. Speaker in the Commons to dispense with the condition. This would be necessary in public or other emergency, and also perhaps for private Members' Bills before the first two or three private Members' days in a Session on account of the shortness of time available for preparation. We fully recognise the need of elasticity ; we hesitate to offer opinions on details of Standing Order procedure, and believe that it will suffice if we indicate the trend of our thought.

B (Regulations).

(B) The procedure for a regulation or rule might be as follows :—

Every regulation or rule made by a Minister in the exercise of delegated law-making power, and laid before the House in pursuance of statutory requirement, would stand referred to the Committee. It would be the duty of the Committee to consider the regulation or rule forthwith, and to report to the House within fourteen clear days of the day on which the regulation or rule was laid.

The Committee would not report on the merits of the regulation or rule but would report :—

(1) whether any matter of principle was involved :

(2) whether the regulation or rule imposed a tax :

(3) whether the regulation or rule was (*a*) permanently challengeable; or (*b*) never challengeable, i.e., unchallengeable from the commencement; or (*c*) challengeable for a specified period of time and thereafter unchallengeable and, if so, what was the specified period :

(4) whether it consisted wholly or partly of consolidation :

(5) whether there was any special feature of the regulation or rule meriting the attention of the House :

(6) whether there were any circumstances connected with the making of the regulation or rule meriting such attention :

(7) whether the regulation or rule should be starred, on the grounds that it was exceptional, and subjected to the procedure described below.

The report of the Committee would be laid on the Table of the House as soon as it had been printed.

As soon as the Report had been tabled, the regulation or rule would be brought before the House in the Orders of the Day and taken immediately after Questions under a limit of time analogous to the present ten minutes rule. In the case of a starred regulation or rule not requiring an affirmative resolution of the House any Member would have the right to move a resolution for annulment without notice. In the case of an unstarred regulation or rule (not requiring an affirmative resolution of the House) any Member would have the right to give notice of a resolution for annulment to be moved immediately after Questions that day week or immediately before the motion for the adjournment for the Recess, whichever should be the sooner.

For the purpose of enabling it to discharge its functions, we suggest that the Committee should have at its disposal certain Clerks of the House to act as a permanent staff and, subject to the consent of the Lord Chairman and the Speaker respectively, should be entitled to the assistance in a consultative capacity of Counsel to the Lord Chairman of Committees, or Counsel to the Speaker as the case may be. The Clerks assigned to this special duty would be free for their ordinary work when not required by the Committee.

Our detailed recommendations for the procedure of the Committees are intended only as an indication of the purpose we have in mind: as we said in Recommendation XIII we do not wish to be read as making positive and detailed recommendations on matters which will have to be regulated under Standing Orders.

Drafting of delegated legislation.

XV. The drafting of delegated legislation is an art requiring specialised knowledge, experience and skill of the kind possessed by the office of Parliamentary Counsel. The whole subject of ensuring a high standard in the drafting, whether by gradually increasing the staff of that office or otherwise, should be taken into consideration by the Departments concerned and the Treasury with a view to a Cabinet decision.

General Note upon the above Recommendations.

16. We interpret our terms of reference as including the powers of delegated legislation exercised by such bodies as the Electricity Commissioners, who are appointed by the Minister of Transport with the concurrence of the Board of Trade, and carry their powers into effect under the Minister's direction.[192a] To all administrative authorities of the kind we regard our recommendations as generally applicable.

[192a] Electricity (Supply) Act, 1919 (9 & 10 Geo. V, c. 100) sections 1 and 39.

SECTION III. JUDICIAL OR QUASI-JUDICIAL DECISION.

The supremacy or rule of law—Its history and meaning.

The Rule of Law a principle of our Constitution.

1. The supremacy or rule of the law of the Land is a recognised principle of the English Constitution. The origin of the principle must be sought in the theory, universally held in the Middle Ages, that law of some kind—the law either of God or man—ought to rule the world.[193] Bracton, in his famous book on English law, which was written in the first half of the thirteenth century, held this theory, and deduced from it the proposition that the king and other rulers were subject to law.[194] He laid it down that the law bound all members of the state, whether rulers or subjects; and that justice according to law was due both to ruler and subject.[195] This view was accepted by the common lawyers of the fourteenth and fifteenth centuries and is stated in the Year Books. In 1441, in the Year Book 19 Henry VI Pasch. pl. 1, it is said : " the law is the highest inheritance which the king has; for by the law he and all his subjects are ruled, and if there was no law there would be no king and no inheritance."

Historical modifications of the principle.

The rise of the power of Parliament in the fourteenth and fifteenth centuries both emphasized and modified this theory of the supremacy of the law. That the rise of the power of Parliament emphasized the theory is shown by the practical application given to it by Chief Justice Fortescue in Henry VI's reign. He used it as the premise, by means of which he justified the control which Parliament had gained over legislation and taxation.[196] That the rise of the power of Parliament modified the theory is shown by the manner in which the theory of the supremacy of the law was combined with the doctrine of the supremacy of Parliament. The law was supreme, but Parliament could change and modify it.[197]

In some continental countries, notably in France, this theory of the supremacy of the law developed into an assertion of the supremacy of a fundamental law, which no power in the State could change and only the lawyers could interpret.[198] A theory so unpractical ceased to exert much influence when, in the seventeenth century, the Royal power made good its claim to absolute sovereignty. But, since in England the accepted theory had taken the more practical form of the supremacy of law subject to the

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[193] Holdsworth, Hist. Eng. Law ii, 121-2, 131-2.

[194] " Ipse autem rex, non debet esse sub homine sed sub Deo et sub lege, quia lex facit regem," f. 5b; " non est enim rex ubi dominatur voluntas et non lex," *ibid.*

[195] In justitia recipienda minimo de regno suo (rex) comparetur," *ibid* f. 107.

[196] De Laudibus Legum Angliae c. 18; The Governance of England c. 3.

[197] Holdsworth, Hist. Eng. Law ii, 441-3.

[198] Holdsworth, Hist. Eng. Law iv, 169-172.

control of Parliament, it prevailed throughout the sixteenth century. Henry VIII in all constitutional questions scrupulously observed the letter of the law;[199] and Bacon in his argument in Calvin's case in 1609 could say that "law is the great organ by which the sovereign power doth move."[200]

The only period when this conception of the rule of law was seriously questioned was in the Stuart period. The Stuart Kings considered that the Royal prerogative was the sovereign power in the State, and so could override the law whenever they saw fit. Chief Justice Coke was dismissed from the bench because he asserted the supremacy of the law. But his views as to the supremacy of the law were accepted by Parliament when it passed the Petition of Right in 1628, and when it abolished the Court of the Star Chamber and the jurisdiction of the Privy Council in England in 1641. Those views finally triumphed as the result of the Great Rebellion, and the Revolution of 1688. In this, as in other matters, Coke's writings passed on the views of the medieval English lawyers into modern English law. But these views were passed on with one important addition, which was the result of the rise, in the sixteenth century, of the modern territorial state. The law which was thus supreme was the law of England; and this included the law, written and unwritten, administered by the Courts of Common Law, by the Courts of Equity, by the Court of Admiralty, and by the Ecclesiastical Courts. Thus the modern doctrine of the rule of law has come, as the result of this long historical development, to mean the supremacy of all parts of the law of England, both enacted and unenacted.

What the rule of law now means.

The best exposition of the modern doctrine and of its corollaries is that contained in Dicey's Law of the Constitution. He says:[201] "That 'rule of law' . . . which forms a fundamental principle of the Constitution, has three meanings, or may be regarded from three different points of view. It means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the Government . . . . It means, again, equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts . . . . The 'rule of law,' lastly, may be used as a formula for expressing the fact that with us the law of the constitution, the rules which in foreign countries naturally form part of a constitutional code, are not the source but the consequence of the rights of individuals as defined and enforced by the Courts."

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[199] Holdsworth, Hist. Eng. Law iv, 201, 283.
[200] Works (Ed. Spedding) vii, 646.
[201] Law of the Constitution (8th Ed., 1915), 198-9.

It is primarily from the first two of these points of view that we approach the problem propounded by our terms of reference; but indirectly Dicey's third point of view has a practical importance at least equal to that of the other two. In his book he has demonstrated how the unwritten constitution of England consists of a set of legal principles gradually evolved out of the decisions of our Courts of Justice in individual cases. Upon the maintenance of the principles evolved by that process the liberty of the subject and the protection of his rights depend. Any encroachment on the jurisdiction of the Courts, and any restriction on the subject's unimpeded access to them, are bound to jeopardise his rights to a much greater degree than would be the case in a country like the United States where they are protected by the express terms of a written constitution; for by any such encroachment the principal safeguard provided by the constitution for the maintenance of the subject's rights is impaired. The same process which built up the constitution may also undermine it. *Necessity of maintaining the rule of law.*

The difference between judicial and quasi-judicial decisions.

2. The word " quasi ", when prefixed to a legal term, generally means that the thing, which is described by the word, has some of the legal attributes denoted and connoted by the legal term, but that it has not all of them. For instance, if a transaction is described as a quasi-contract it means that the transaction has some of the attributes of a contract but not all. Perhaps the best translation of the word " quasi ", as thus used by lawyers, is " not exactly ". A " quasi-judicial " decision is thus one which has some of the attributes of a judicial decision, but not all. In order, therefore, to define the term " quasi-judicial decision ", as it is used in our terms of reference, we must discover which of the attributes of a true judicial decision are included and which are excluded. *Meaning of "quasi".*

A true judicial decision presupposes an existing dispute between two or more parties, and then involves four requisites :— *Nature of true judicial decisions.*

(1) the presentation (not necessarily orally) of their case by the parties to the dispute; (2) if the dispute between them is a question of fact, the ascertainment of the fact by means of evidence adduced by the parties to the dispute and often with the assistance of argument by or on behalf of the parties on the evidence; (3) if the dispute between them is a question of law, the submission of legal argument by the parties; and (4) a decision which disposes of the whole matter by a finding upon the facts in dispute and an application of the law of the land to the facts so found, including where required a ruling upon any disputed question of law.

A quasi-judicial decision equally presupposes an existing dispute between two or more parties and involves (1) and (2), but does not necessarily involve (3), and never involves (4). The place *Nature of quasi-judicial decisions*

of (4) is in fact taken by administrative action, the character of which is determined by the Minister's free choice.

For example, suppose a statute empowers a Minister to take action if certain facts are proved, and in that event gives him an absolute discretion whether or not he will take action.[202] In such a case he must consider the representations of the parties and ascertain the facts—to that extent the decision contains a judicial element. But, the facts once ascertained, his decision does not depend on any legal or statutory direction, for *ex hypothesi* he is left free within his statutory powers to take such administrative[202a] action as he may think fit: that is to say the matter is not finally disposed of by the process of (4). Whereas it is of the essence of a judicial decision that the matter is finally disposed of by that process and nothing remains to be done except the execution of the judgment, a step which the law of the land compels automatically, in the case of the quasi-judicial decision the finality of (4) is absent; another and a different kind of step has to be taken; the Minister—who for this purpose personifies the whole administrative Department of State—has to make up his mind whether he will or will not take administrative action and if so what action. His ultimate decision is "quasi-judicial", and not judicial, because it is governed, not by a statutory direction to him to apply the law of the land to the facts and act accordingly, but by a statutory permission to use his discretion after he has ascertained the facts and to be guided by considerations of public policy. This option would not be open to him if he were exercising a purely judicial function.

Decisions may be truly judicial though not given by a Court of Law

It is obvious that if all four of the above-named requisites to a decision are present, if, for instance, a Minister, having ascertained the facts, is obliged by the statute to decide solely in accordance with the law, the decision is judicial. The fact that it is not reached by a court so-called, but by a Minister acting under statutory powers and under specialised procedure, will not make the decision any the less judicial.

For example the Unemployment Insurance Acts, 1920[203] to 1930,[204] require all "employed persons" aged sixteen and upwards,

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[202] e.g. s. 91 of the Road Traffic Act, 1930 (20 & 21 Geo. 5, c. 43), under which the Minister of Transport is directed to consider the report of the person appointed by him to hold a public inquiry, the responsibility for deciding the question of fact and considering the arguments of the parties being left by the Section upon the Minister's own shoulders. See R. *v.* The Minister of Transport. *Ex parte* Southend Carriers, Ltd. "The Times," 18th December, 1931.

[202a] Usually the administrative action imports an executive decision: sometimes it partakes of a legislative character—as for instance when the Minister makes an order "approving" a town planning scheme—but the distinction for the purposes of this Section of our Report need not be laboured.

[203] 10 & 11 Geo. 5, c. 30.

[204] 20 & 21 Geo. c. 16.

of either sex, whether British subjects or aliens, to be insured against unemployment, unless engaged in an " excepted employment " or unless, although engaged in an " insurable employment ", they are " exempt persons ". The Acts provide that if any question arises whether any employment or class of employment is such employment as to make the person engaged therein an employed person within the meaning of the Act, the question shall be decided by the Minister of Labour unless he elects to refer it for decision to the High Court. In such a case the decision is clearly judicial whether it is given by the Minister or by the Court. Neither the Minister nor the Court has any discretion in the matter. The question to be decided turns entirely on the application of the law as laid down in the Acts to the facts of the particular case. The judicial character of the Minister's decision, when he gives the decision himself, is recognised and illustrated by the provision in the Acts that any person aggrieved by the decision of the Minister may appeal from that decision to the High Court and by the further provision that the Minister shall have regard to the decisions given by the Umpire by whom such questions were determined under the earlier Unemployment Insurance legislation.[205]

Natural Justice.

3. In the above analysis we have tried to explain the essential characteristics of a judicial decision in the full sense of the phrase; and we have expressed the view that the quasi-judicial decision imports only some, and not all, of those characteristics; or, putting the same point in another form, that the Minister at some stage in his mental operations before his action takes final shape passes from the judge into the administrator. But whether the function be judicial or quasi-judicial, its exercise presupposes the existence of a dispute and parties to the dispute, and it is this feature which separates the judicial and quasi-judicial function on the one hand from the administrative on the other. As we have already pointed out, a judicial element is involved in quasi-judicial as well as in judicial functions; and it has been truly said that, however much a Minister in exercising such functions may depart from the usual forms of legal procedure or from the common law rules of evidence, he ought not to depart from or offend against " natural justice." That phrase is perhaps more often used than understood, and we therefore venture to say what we understand by it.

Before doing so, however, it may be well to call attention to two cases—*Buchanan* v. *Rucker*[206] and *Schibsby* v. *Westenholz*[207]—which show that the conception of " natural justice " must be regarded as belonging to the field of moral and social principles

[205] Further examples of purely judicial decisions are given in para. 8 on pages 88 to 90.
[206] (1807) 1 Camp. 66.
[207] (1870) L.R. 6 Q.B. 155.

and not as having passed into the category of substantive law, so as necessarily to make every act obnoxious to its canons a transgression of a legal rule recognised and enforced as such by our Courts. In the former case Lord Ellenborough declared at *nisi prius*[208] that it was " contrary to the first principles of reason and justice that either in civil or criminal proceedings a man should be condemned before he was heard " and that " the practice of the Law Courts of Tobago to summon a defendant who was out of the jurisdiction and never had been within it by nailing the writ on the door of the Court-house was *mala praxis* "[209] and could not be sanctioned. In the latter case these observations were considered by the Court of King's Bench. The judgment of the Court (Mr. Justice Blackburn, Mr. Justice Mellor, Mr. Justice Lush and Mr. Justice Hannen) was delivered by Mr. Justice Blackburn. Their Lordships stated that " Lord Ellenborough's expressions were used in the hurry of *nisi prius*,[208] and that when the case came before him *in banco*[208] in *Buchanan* v. *Rucker*[210] he entirely abandoned what (with all deference to so great an authority) they could not regard as more than declamation." But although " natural justice " does not fall within those definite and well-recognised rules of law which English Courts of Law enforce, we think it is beyond doubt that there are certain canons of judicial conduct to which all tribunals and persons who have to give judicial or quasi-judicial decisions ought to conform. The principles on which they rest are we think implicit in the rule of law. Their observance is demanded by our national sense of justice; and it is, we think, the desire to secure safeguards for their observance, more than any other factor, which has inspired the criticisms levelled against the Executive and against Parliament for entrusting judicial or quasi-judicial functions to the Executive.

The demands of our national sense of justice.

First principle of natural justice.

(i) The first and most fundamental principle of natural justice is that a man may not be a judge in his own cause. It is on this ground that a decision of a bench of magistrates may be quashed by the

[208] Note on the meaning of the Latin expressions " nisi prius " and " in banco." Lord Ellenborough was Chief Justice of the Court of King's Bench. When he was trying cases with a jury at the Guildhall, he was said to be sitting at *Nisi Prius*, because the writ for summoning the jury commanded the Sheriff of Middlesex to bring the jurors to the Court of King's Bench at Westminster on a certain day " unless before that day " (*Nisi Prius*) the Judges came to the Guildhall, as in practice they invariably did. The issue of fact having been determined by the jury at *Nisi Prius*, the Chief Justice reported the verdict of the jury to the Court of King's Bench, which pronounced judgment. But before judgment was pronounced all rulings on points of law given by the Chief Justice at the trial at *Nisi Prius* were subject to review by himself and the four other Judges of the Court, sitting *in banco*, i.e., in Bench or full Court. See Ralph Sutton's Personal Actions at Common Law, c. 7. (Butterworth, 1929.)

[209] " Mala praxis ". This hybrid Latin and Greek phrase may be translated " bad practice ".

[210] (1808) 9 East 192.

King's Bench Division of the High Court of Justice, in the exercise of its supervisory jurisdiction, on the ground of bias, if a single magistrate on the bench had any interest in the question at issue.

In *Dimes* v. *Grand Junction Canal* (*Proprietors of*) (1852) 3 H.L.C. 759, the House of Lords, after consulting the Judges, decided that the decree of the Lord Chancellor, affirming the order of the Vice-Chancellor, granting relief to a company in which the Lord Chancellor had an interest as a shareholder to the amount of several thousand pounds, which was unknown to the defendant in the suit, was voidable on that account and must therefore be set aside. In the course of his speech Lord Campbell said :—

" No one can suppose that Lord Cottenham could be, in the remotest degree, influenced by the interest that he had in this concern ; but, my Lords, it is of the last importance that the maxim than no man is to be a judge in his own cause should be held sacred. And that is not to be confined to a cause in which he is a party, but applies to a cause in which he has an interest. Since I have had the honour to be Chief Justice of the Court of Queen's Bench, we have again and again set aside proceedings in inferior tribunals because an individual who had an interest in a cause took a part in the decision. And it will have a most salutary influence on these tribunals when it is known that this High Court of last resort, in a case in which the Lord Chancellor of England had an interest, considered that his decision was on that account a decision not according to law, and was set aside. This will be a lesson to all inferior tribunals to take care not only that in their decrees they are not influenced by their personal interest, but to avoid the appearance of labouring under such an influence."

In that case the Lord Chancellor's disqualification was pecuniary interest. It goes without saying that in no case in which a Minister has a pecuniary or any other similar personal interest in a decision, e.g. as the owner—whether in his own right or as a trustee—of property which may be affected, should he exercise either judicial or quasi-judicial functions. Such cases may be presumed to be rare, and we do not think it necessary for us to make any special recommendations about them.

But disqualifying interest is not confined to pecuniary interest. In *Reg.* v. *Rand* (1866) L.R. 1 Q.B. 230 the Court of Queen's Bench laid it down that wherever there was a real likelihood that the judge would, from kindred or any other cause, have a bias in favour of one of the parties, it would be very wrong in him to act. In *Rex.* v. *Sunderland Justices* (1901) 2 K.B. 357 this rule was applied by the Court of Appeal in the case of certain borough justices, who were also members of the Borough Council and adjudicated in a matter arising out of a proposal which they had

actively supported in the Council, although their pecuniary interest as trustees for the ratepayers was held insufficient in itself to raise the presumption of bias. " It is hardly necessary to point out," said the Master of the Rolls, " how very important it is that persons who have to exercise judicial functions with regard to any matter should not lay themselves open to any suggestion of bias on their part."

Indeed we think it is clear that bias from strong and sincere conviction as to public policy may operate as a more serious disqualification than pecuniary interest. No honest man acting in a judicial capacity allows himself to be influenced by pecuniary interest : if anything, the danger is likely to be that through fear of yielding to motives of self-interest he may unconsciously do an injustice to the party with which his pecuniary interest may appear to others to identify him. But the bias to which a public-spirited man is subjected if he adjudicates in any case in which he is interested on public grounds is more subtle and less easy for him to detect and resist.

We are here considering questions of public policy and from the public point of view it is important to remember that the principle underlying all the decisions in regard to disqualification by reason of bias is that the mind of the judge ought to be free to decide on purely judicial grounds and should not be directly or indirectly influenced by, or exposed to the influence of, either motives of self-interest or opinions about policy or any other considerations not relevant to the issue.

We are of opinion that in considering the assignment of judicial functions to Ministers Parliament should keep clearly in view the maxim that no man is to be judge in a cause in which he has an interest. We think that in any case in which the Minister's Department would naturally approach the issue to be determined with a desire that the decision should go one way rather than another, the Minister should be regarded as having an interest in the cause. Parliament would do well in such a case to provide that the Minister himself should not be the judge, but that the case should be decided by an independent tribunal.

It is unfair to impose on a practical administrator the duty of adjudicating in any matter in which it could fairly be argued that his impartiality would be in inverse ratio to his strength and ability as a Minister. An easy-going and cynical Minister, rather bored with his office and sceptical of the value of his Department, would find it far easier to apply a judicial mind to purely judicial problems connected with the Department's administration than a Minister whose head and heart were in his work. It is for these reasons and not because we entertain the slightest suspicion of the good faith or the intellectual honesty of Ministers and their advisers

that we are of opinion that Parliament should be chary of imposing on Ministers the ungrateful task of giving judicial decisions in matters in which their very zeal for the public service can scarcely fail to bias them unconsciously.

We desire to make it plain that we are recommending a general principle as a future safeguard : we do not wish to imply that the principle, though it has perhaps not been clearly envisaged, is in fact violated in any existing statutes, and we have been unable to find evidence to support the view held by some critics that it occurs extensively. An interesting example of the way in which Parliament has observed the principle will be found in old age pension legislation : under Sections 7 and 8 of the Old Age Pensions Act 1908[211] the Minister of Health is the central pension authority for determining appeals, although the Commissioners of Customs and Excise, who are responsible to the Treasury, i.e. in practice to the Chancellor of the Exchequer, are the Department responsible for the administration of pensions.

The application of the principle which we have just enunciated to quasi-judicial decision is not so easy, since a quasi-judicial decision ultimately turns upon administrative policy for which an executive Minister should normally be responsible. We think, however, that before Parliament entrusts a Minister with the power and duty of giving quasi-judicial decisions as part of a legislative scheme, Parliament ought to consider whether the nature of his interest as Minister in the carrying out of the functions to be entrusted to him by the statute may be such as to disqualify him from acting with the requisite impartiality. The comparative importance of the issues involved in the decision will, of course, be a relevant factor. Where it appears that the policy of the Department might be substantially better served by a decision one way rather than another, the first principle of natural justice will come into play, and the Minister should not be called upon to perform the incongruous task of dealing with the judicial part of the quasi-judicial decision as an impartial judge, when *ex hypothesi* he and his Department want the decision to be one way rather than another. We recognise that this kind of case may be rare, but it is a real possibility. In such a case the judicial functions which must be performed before the ultimate decision is given and on which that decision must be based should be entrusted by Parliament to an independent Tribunal whose decision on any judicial issues should be binding on the Minister when in his discretion he completes the quasi-judicial decision by administrative action.

Second principle of natural justice.

(ii) The second principle of natural justice is one which has two aspects, both of which are as applicable to quasi-judicial as to judicial decisions. No party ought to be condemned unheard ; and

[211] 8 Edw. 7, c. 40.

if his right to be heard is to be a reality, he must know in good time the case which he has to meet. But on neither branch of this principle can any particular procedure (i) by which the party is informed of the case which he has to meet, or (ii) by which his evidence and argument are " heard," be regarded as fundamental. That a Minister or a Ministerial Tribunal does not conform to the procedure of the Courts in either respect imports no disregard of natural justice. There is, for instance, no natural right to an oral hearing.

Third principle of natural justice.

(iii) It may well be argued that there is a third principle of natural justice, namely, that a party is entitled to know the reason for the decision, be it judicial or quasi-judicial. Our opinion is that there are some cases when the refusal to give grounds for a decision may be plainly unfair; and this may be so, even when the decision is final and no further proceedings are open to the disappointed party by way of appeal or otherwise. But it cannot be disputed that when further proceedings are open to a disappointed party, it is contrary to natural justice that the silence of the Minister or the Ministerial Tribunal should deprive him of his opportunity. And we think it beyond all doubt that there is from the angle of broad political expediency a real advantage in communicating the grounds of the decision to the parties concerned and, if of general interest, to the public. We deal with this question more fully in paragraph 13 of this Section.

A possible fourth principle.

(iv) Some judges have discerned a fourth principle of natural justice, which other judges have declined to admit, viz. : that when Parliament has provided for what amounts to an oral hearing by the method of a " public inquiry," local or otherwise, held before an inspector appointed for the purpose by the Minister, as a means of guidance to the Minister in his decision—whether judicial or quasi-judicial—it is contrary to natural justice that the inspector's report upon the inquiry should not be made available to the parties so heard. Such an inquiry is plainly intended by Parliament to be the means by which all the main relevant facts are to be ascertained, and the main arguments of the parties affected are to be heard. Those parties are justly entitled, it is said, to know what facts are found by the inspector and how he sums up the arguments he has heard, so that they may know what material is put before the Minister for his decision.

Whether a refusal of such publication to the parties is contrary to natural justice may possibly be open to some doubt; but it is plain that important considerations of public policy are involved, and we need not pause to survey the border land between high public policy and natural justice in order to discover the theoretical boundary. We revert to this question at greater length in paragraph 14 of this Section.

Administrative decisions to be distinguished.

Distinction between administrative and judicial decisions.

4. Decisions which are purely administrative stand on a wholly different footing from quasi-judicial as well as from judicial decisions and must be distinguished accordingly. Indeed the very word " decision " has a different meaning in the one sphere of activity and the other. When a person resolves to act in a particular way, the mental step may be described as a " decision." Again, when a judge determines an issue of fact upon conflicting evidence, or a question of law upon forensic argument, he gives a " decision." But the two mental acts differ. In the case of the administrative decision, there is no legal obligation upon the person charged with the duty of reaching the decision to consider and weigh submissions and arguments, or to collate any evidence, or to solve any issue. The grounds upon which he acts, and the means which he takes to inform himself before acting, are left entirely to his discretion. We may illustrate our meaning by two examples of such a " decision "; (1) the decision of the Admiralty to place a Departmental contract for stores—an act of a purely " business " character; (2) the decision of the Home Secretary to grant naturalization to a particular alien, a matter upon which Parliament has given him an absolute discretion.[212]

Judicial elements in administrative decisions.

But even a large number of administrative decisions may and do involve, in greater or less degree, at some stage in the procedure which eventuates in executive action, certain of the attributes of a judicial decision. Indeed generally speaking a quasi-judicial decision is only an administrative decision, some stage or some element of which possesses judicial characteristics. And it is doubtless because so many administrative acts have this character that our terms of reference have specially included quasi-judicial decisions.

The intermingling of the two elements in one composite " decision " is well illustrated by the type of case where the judicial element looms large in proportion to the administrative, although the final act is administrative. Instances we have in mind are the decisions of licensing authorities constituted under an Act of Parliament with an obligation to grant licences to fit and proper persons in accordance with the intentions and under the conditions of the Acts; as for example the Licensing Justices in their annual meeting under the Licensing Acts, 1910[214] and 1921[215] : the Traffic Commissioners under Part IV of the Road Traffic Act, 1930,[216] ; or the Minister of Transport himself on appeal from the Commissioners under Section 81 of that Act. The ultimate decision is administrative

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[212] The British Nationality and Status of Aliens Act, 1914 (4 & 5 Geo. 5, c. 17), s. 2, ss. (3).
[214] 10 Edw. 7 & 1 Geo. 5, c. 24, s. 10.
[215] 11 & 12 Geo. 5, c. 42, s. 12.
[216] 20 & 21 Geo. 5, c. 43.

and not judicial in each case—whether given by a justice, a commissioner, or the Minister. But evidence has to be considered and weighed; arguments on fact and possibly law have to be heard, and conclusions reached; irrelevant and improper considerations have to be excluded; and the body hearing the application must be disinterested and free from bias. And it is only after they have taken all the above preliminary steps judicially that they pass into pure administration and in the exercise of administrative discretion on grounds of public policy choose to grant or withhold a licence.[217]

Questions to be answered.

Decisions by Ministers.

5. The second part of our terms of reference imposes upon us the duty of investigating and reporting upon all judicial and quasi-judicial decisions entrusted by Parliament either to executive Ministers of the Crown personally or to persons or bodies appointed by a Minister or Ministers to adjudicate either on a special question, or on a special type of question, arising in the course of the administrative work of a Department of State.

Decisions by persons specially appointed by Ministers.

Such persons or bodies must necessarily be included in our investigation because there is a possibility that through the right of appointment and re-appointment some degree of control or influence may be exercised by the Minister, with the result that the " judge " may be in a position of less independence and impartiality than he ought to occupy. The language used in our terms of reference is no doubt intentionally rather vague, but we interpret it as not primarily directed to those judicial Tribunals which are recognised as being in fact wholly free from Ministerial influence, direct or indirect. In so far as we discuss them it is for the purpose of differentiation, and of obtaining light on our proper subject. We refer to them hereafter as " Specialised Courts of Law ".

The practice of entrusting judicial, as distinct from quasi-judicial, functions to Ministers themselves has been resorted to by Parliament with comparative infrequency, and at the present time it is certainly exceptional.

On the other hand Parliament has frequently thought fit for various reasons of public policy to entrust judicial functions to bodies or persons specially appointed by Ministers (to those we refer as " Ministerial Tribunals ") rather than to Courts of Law, whether ordinary or specialised.

Question one of extent and safeguards.

The real questions for us to answer would seem to be :—

(*a*) To what extent should judicial functions be entrusted (i) to Ministers and (ii) to Ministerial Tribunals;

(*b*) What are the right methods for the exercise of such functions? What are the proper safeguards?

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[217] Lord Halsbury's exposition of the duty of justices to exercise their discretion to grant or not to grant a licence judicially in *Sharp* v. *Wakefield* [1891] A.C. 173 at 178-182, may be consulted by those who wish to pursue the analysis further.

Specialised Courts of Law.

6. There are on the Statute Book a considerable number of instances in which Parliament has excluded certain kinds of justiciable issues from the jurisdiction of the ordinary Courts of Law, and entrusted them to specialised Courts which it has established for the purpose.

Domestic Courts in certain professions not appointed by Ministers.

Some of these Courts are not appointed by or on the advice of Ministers of the Crown at all; and in some cases they exercise a jurisdiction which lies entirely outside the sphere of the central administration of the State.

For example under the Solicitors Act, 1919,[218] a Committee of the Law Society known as the Discipline Committee has power "after hearing the case" to strike a solicitor off the Roll of Solicitors, subject to an appeal to the High Court of Justice.

Under the Midwives Act, 1902,[219] a woman whose name is removed by the Central Midwives Board from the roll of midwives is not allowed to practice as a midwife, though under Section 4 of the Act any woman aggrieved by such a decision may appeal within three months to the High Court of Justice.

Under the Medical Act, 1858,[220] the General Medical Council has power to erase the name of any registered medical practitioner, judged by the Council after due inquiry to have been guilty of infamous conduct in any professional respect, from the Medical Register, which is the instrument created by Parliament for the purpose of marking the distinction between qualified and unqualified medical practitioners. A sentence that a doctor's name be erased may thus entail deprivation of professional income. From the Medical Council's decision, unlike that of the Discipline Committee of the Law Society and the Midwives Board just mentioned, there is no appeal.

Courts for certain categories of disputes not appointed by Ministers.

On the other hand some of these specialised Courts appointed otherwise than by Ministers of the Crown have been appointed to determine justiciable issues arising between private persons and Departments of State. For example under Sections 33 and 34 of the Finance (1909-10) Act, 1910,[221] appeals against Inland Revenue valuation were assigned to referees appointed by the Lord Chief Justice, the Master of the Rolls and the President of the Surveyors' Institution;[222] while under the Acquisition of Land (Assessment of

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[218] 9 & 10 Geo. 5, c. 56.
[219] 2 Edw. 7, c. 17.
[220] 21 & 22 Vict., c. 90.
[221] 10 Edw. 7, c. 8.
[222] or for Scotland and for Northern Ireland by persons with similar qualifications.

Compensation) Act, 1919,[223] any question of disputed compensation arising out of the compulsory acquisition of land by any Government Department, or any local or public authority, is determined by the arbitration of one of a panel of official arbitrators appointed by the same persons.

It is clear that none of the above Courts, whether the issues referred to their determination arise within or without the sphere of the central administration of the State, are within our terms of reference, since they are not appointed by, and are wholly independent of, Ministers of the Crown.

Specialised Courts appointed by or on the recommendation of Ministers.

There are other specialised Courts which are appointed by or on the recommendation of Ministers of the Crown and therefore do fall within our terms of reference. But several of these Courts are in fact absolutely independent of Ministerial influence, and function as regularly constituted Courts of Law although exercising a specialised jurisdiction.

As we say elsewhere in this report we regard it as a sound presumption of legislative policy that judicial tasks should be left to His Majesty's Judges, and special Courts constituted by Parliament only where there are definite reasons of public advantage in favour of departure from the normal course. The smallest departure from it is to compose the Court of one of His Majesty's Judges and two Commissioners as is the case to-day with the Railway and Canal Commission.

The Railway and Canal Commission.

The statutory history of that Court is interesting.

In the early days of railways and down to the year 1873 the obligations imposed upon railway companies by various statutes, notably the Railway and Canal Traffic Act, 1854,[224] were enforced by proceedings in the Court of Common Pleas. In the year 1873, however, on the passing of a new Railway and Canal Traffic Act,[225] Parliament thought fit to transfer the jurisdiction of the Court of Common Pleas in railway matters to a new Court created by the Act, and consisting of three Commissioners, of whom one must be of experience in the law, and another of experience in railway business. In 1888 this Court was remodelled and its jurisdiction enlarged by the Railway and Canal Traffic Act of that year.[226] The Court is now a Court of Record, styled the Railway and Canal Commission, under the presidency

(*a*) in England of one of the Judges of the High Court of Justice, assigned by the Lord Chancellor;

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[223] 9 & 10 Geo. 5, c. 57.
[224] 17 & 18 Vict., c. 31.
[225] 36 & 37 Vict., c. 48.
[226] 51 & 52 Vict., c. 25.

(*b*) in Scotland of one of the Judges of the Court of Session, assigned by the Lord President; and

(*c*) in Northern Ireland of the Lord Chief Justice.

Under the Act of 1888 the other two Commissioners were appointed by the Crown on the recommendation of the President of the Board of Trade, but the right of appointment has been transferred to the Home Secretary under Section 2 of the Ministry of Transport Act, 1919.[227] The Court deals with all questions of facilities and preference, can compel two or more companies to make mutual arrangements for through traffic over their railways and may determine disputes of many kinds between railway companies. There is no appeal from a decision of the Commissioners upon a question of fact; but upon a question of law there is an appeal to the Court of Appeal.

In addition to their jurisdiction in railway matters the Commissioners now exercise an important jurisdiction under the Mines (Working Facilities and Support) Act, 1923,[228] and the Mining Industry Act, 1926:[229] see below, paragraph 9, pp. 95-96.

The Railway Rates Tribunal.

All the powers of the Commission in respect of rates and charges have now been transferred to the Railway Rates Tribunal, which was established under the Railways Act, 1921,[230] and consists of three permanent members who are "whole-time officers" and are appointed for a term of years with eligibility for re-appointment at the end of the term. They are appointed by His Majesty on the recommendation of the Lord Chancellor, the President of the Board of Trade, and the Minister of Transport. One must be a person of experience in commercial affairs, one a person of experience in railway business, and one, who is the president, must be an experienced lawyer. They determine questions of great importance relating to the carriage of passengers and merchandise by railway and have almost absolute control over all the charges a railway company may legally demand. Many of these are partly questions of policy, so that the Court has administrative as well as judicial functions. Its procedure and practice are governed by General Rules made by the Court itself with the approval of the Lord Chancellor, the Lord President of the Court of Session, and the Minister of Transport. Its decisions are subject to appeal to the Court of Appeal, or to the Court of Session, as the case may be, on points of law.

The Registrar of Friendly Societies.

Another well-known Court of this type is the Chief Registrar of Friendly Societies, who must be a barrister of not less than twelve years standing. He is appointed by the Treasury and holds

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[227] 9 & 10 Geo. 5, c. 50.
[228] 13 & 14 Geo. 5, c. 20.
[229] 16 & 17 Geo. 5, c. 28.
[230] 11 & 12 Geo. 5, c. 55, s. 20.

his office during their pleasure. Under Section 68 of the Friendly Societies Act, 1896,[231] the parties to a dispute in a registered society or branch may, by consent (unless the rules of the society or branch expressly forbid), refer the dispute to the Chief Registrar, or in Scotland or Northern Ireland to an Assistant Registrar, for determination, subject to the consent of the Treasury. Such reference is a submission to arbitration within the meaning of the Arbitration Act, 1889.[232] At the request of either party he may state a case for the opinion of the High Court of Justice. Under Section 80 he has powers of investigation into the affairs of societies and branches, and may award that the society or branch be dissolved. His powers in such an investigation are similar to those exerciseable by him on reference of a dispute. The Registrar also has jurisdiction under the Trade Union Act, 1913,[233] as amended by the Trade Disputes and Trade Unions Act, 1927,[234] and under other statutes. A full list of his powers will be found in the Note and Memorandum from the Registrar of Friendly Societies, printed in the first of the companion Volumes to our Report. As Industrial Assurance Commissioner, he has power to deal with disputes under the Industrial Assurance Act, 1923,[235] as if they were disputes referred to him under Section 68 of the Friendly Societies Act, 1896,[231] and the consent of the Treasury to his dealing therewith had been given.

The Special Commissioners of Income Tax.

The Special Commissioners of Income Tax, whose functions extend over the whole country, are a body of whole-time officials, now appointed by the Treasury under the Income Tax Act, 1918,[236] and holding office during their pleasure. They have an office in London, but they also sit elsewhere as occasion demands. They have appellate jurisdiction in matters relating to income tax and sur-tax and can be required to state a case for the opinion of the High Court on a point of law arising out of an appeal heard by them. The Court consists of Crown servants and hears and determines appeals of great importance in issues arising between the Crown and the subject. An account of the Special Commissioners will be found in Section IV of Part IV of the Report (Cmd. 615 of 1920) of the Royal Commission on the Income Tax, which in paragraph 359 speaks highly of the public confidence felt in this body of public servants.

This specialised Court is of peculiar interest. By common consent it gives general satisfaction by its impartiality, in spite of

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[231] 59 & 60 Vict., c. 25.
[232] 52 & 53 Vict., c. 49.
[233] 2 & 3 Geo. 5, c. 30.
[234] 17 & 18 Geo. 5, c. 22.
[235] 13 & 14 Geo. 5, c. 8.
[236] 8 & 9 Geo. 5, c. 40, a Consolidation Act. The Special Commissioners date from 1842.

the fact that its members are not only appointed by the Treasury, but may, when not performing judicial duties, actually act as administrative officials. All we can say about it is that it is a standing tribute to the fair-mindedness of the British Civil Service; but the precedent is not one which Parliament should copy in other branches of administration.

The Board of Referees

Another Court of this type is the Board of Referees, who hear applications and appeals by taxpayers on certain matters specified in the Income Tax Acts. They are appointed by the Treasury. The Board, whose address is at the Royal Courts of Justice, London, consists of professional and business men with special qualifications for dealing with the matters within their jurisdiction, with a King's Counsel for Chairman.

Ministerial Tribunals.

7. There are other specialised Courts of a more informal character, created by Statute, whose members are appointed for the express purpose of determining justiciable issues arising in connection with the work of a Government Department, whether as Courts of First Instance, or as Courts of Appeal. We regard our terms of reference as directed more particularly to Courts of this type, although the distinction between them and the specialised Courts described in the last paragraph is essentially one not of kind but of degree.

Unemployment Insurance.

For example, under the Unemployment Insurance Acts, 1920[237] to 1930,[238] a claim for benefit is submitted to an insurance officer appointed by the Minister of Labour. The insurance officer may either allow the claim or refer the matter for decision to the Court of Referees (which consists of an equal number of representatives of employers and insured contributors and a Chairman appointed by the Minister) or, if he is of opinion that the claimants' unemployment is due to a trade dispute, may himself disallow the claim, subject to appeal to the Court of Referees. Elaborate provision is made for appeals from the decisions of the Court of Referees to the Umpire appointed by His Majesty; the Umpire's decision is final.

War Pensions.

Under the War Pensions Act, 1921,[240] any person who is dissatisfied with a final award under Section 4 of that Act may appeal to a Pensions Appeal Tribunal appointed by the Lord Chancellor (or in Scotland by the Lord President of the Court of Session and in Ireland by the Secretary of State). The decision of the Pensions Appeal Tribunal is final.

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[237] 10 & 11 Geo. 5, c. 30.
[238] 20 & 21 Geo. 5, c. 16.
[240] 11 & 12 Geo. 5, c. 49.

Contributory Pensions.

Under the Widows', Orphans' and Old Age Contributory Pensions Act, 1925,[241] any person dissatisfied by the award or decision of the Minister of Health (or Department of Health for Scotland as the case may be) in respect of any pension may have the question referred to a referee or referees selected from a panel of barristers and solicitors appointed by the National Health Insurance Joint Committee. No officer of the Department may be a member of the panel. The decision of the referee or referees is final and conclusive, except that they may state a case on a point of law for the High Court (or in Scotland the Court of Session) or in either case the Court may order them to do so.[242]

Judicial and quasi-judicial decisions by Ministers themselves.

8. From the judicial powers of Ministerial Tribunals we pass straight to examples of the judicial and quasi-judicial powers conferred by Parliament on Ministers themselves.

We have already pointed out in paragraph 2 that a quasi-judicial decision differs from a judicial decision in that it is governed, not by a statutory direction to the Minister to apply the law of the land to the facts and act accordingly, but by a statutory direction or permission to use his administrative discretion and to be guided by considerations of public policy after he has ascertained the facts and, it may be, the bearing of the law on the facts so ascertained.

Examples of judicial decisions by Ministers.

As already stated, the entrusting of *judicial* decisions to Ministers themselves is rare in existing statutes. An example will be found in Section 268 of the Public Health Act, 1875.[243] Under this section, any person who deems himself aggrieved by the decision of the Local Authority in any case in which the Local Authority are empowered to recover in a summary manner any expenses incurred by them, or to declare such expenses to be private improvement expenses, may address a memorial to the Minister of Health, stating the grounds of his complaint. The memorialist must at the time deliver a copy of the memorial to the Local Authority. The Minister is then empowered to make such order in the matter as to him may seem equitable, and the order so made shall be binding and conclusive on all parties.

In *Reg.* v. *Local Government Board*, (1882) 10 Q.B.D. 309 Brett L.J. after expressing the opinion that the decision of the Local Government Board, to whom the appeal under Section 268 originally lay, was a judicial decision said :—

> " The Local Government Board have power to inquire into every circumstance, however remote, which could reasonably determine the question whether it was inequitable or not

[241] 15 & 16 Geo. 5, c. 70.
[242] Further illustrations of tribunals of this class will be found in Annex IV.
[243] 38 & 39 Vict, c. 55.

that a particular sum should be paid. If that be so, they do not inquire into former matters as decisions of the Local Authority, but they inquire into them as facts in order to enable them to determine upon the largest interpretation of the word " equitable " that can be given to it, whether the particular sum is one which it is equitable, fair and right that the individual should be forced by the Legislature to pay for works which have been done against his will; and therefore I should be loth to the extremest degree to fetter the power of the Local Government Board to inquire into every fact which could reasonably lead them to a fair and equitable conclusion with regard to that question which is the question before them."

Under Section 139 of the Law of Property Act, 1922,[244] the compensation for extinguishment of manorial rights is to be ascertained in accordance with a statutory scale, and the scale is binding as a matter of law in all cases, unless on application being made to the Minister of Agriculture and Fisheries on the part either of the lord of the manor or the tenant the Minister decides that owing to any special custom or other exceptional circumstances the application of the scale would work injustice to either party, and if the Minister so decides, the Minister may, if he thinks fit, vary the scale, or fix some other scale which shall be applicable to the case.

In this instance it is plain that the Minister's functions are as strictly judicial as any function can possibly be. The sole considerations by which he is entitled to be influenced in arriving at a decision are considerations of justice between the parties. No question of policy arises and no considerations of policy must influence him. The duty imposed upon him by the section is the duty of acting strictly as a judge.

Under Section 89 of the National Health Insurance Act, 1924,[245] the determination of several important questions is entrusted to the Minister of Health, e.g., whether any employment is employment within the meaning of the Act. This again is on the face of it a strictly judicial power. If a hearing is necessary, the Minister appoints a member of the legal staff of the Department who is either a barrister or a solicitor to hear the persons interested and to report to him thereon. It is customary to give at least seven days' public notice of the date and place fixed for the hearing. Counsel may be heard. The Minister's decision is drawn

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[244] 12 & 13 Geo. 5, c. 16.

[245] 14 and 15 Geo. 5, c. 38. For a detailed description of these decisions the reader is referred to the " Memorandum on powers conferred on the Minister of Health of a judicial or quasi-judicial nature," (Second companion volume, 9th day evidence).

up in the form of a memorandum which is communicated to the persons interested; but no express obligation is laid upon him to give reasons. There is an appeal on any question of law to a Judge of the High Court selected for the purpose by the Lord Chancellor, whose decision is final. The Minister may, if he thinks fit, submit the question for decision to the High Court in the first instance; and if he does so, the decision of that Court is again final. On any appeal from his decision the Minister is entitled to appear and to be heard.

Sub-section (2) of Section 29 of the Education Act, 1921,[247] imposes on a local education authority the duty of maintaining and keeping efficient a public elementary school not provided by them only so long as it is necessary and the statutory conditions and provisions are complied with. In *Board of Education* v. *Rice*[248] the Managers of the Oxford Street voluntary school at Swansea claimed that the local education authority had failed to discharge its statutory duty under the corresponding section of the Education Act, 1902,[249] which is repealed and replaced by the Act of 1921. Under Sub-section (3) of Section 7 of the Act of 1902 the question fell to be determined by the Board of Education, as a like question now falls under sub-section (9) of Section 29 of the Act of 1921. In that case the House of Lords, affirming the decision of the Court of Appeal, who had affirmed the decision of the Divisional Court, held that the Board had not determined the question, though they had purported to do so, and that a *mandamus* must issue commanding them to determine it. Lord Justice Farwell lays it down in his judgment in the Court of Appeal,[250] that under the sub-section in question the Board act in a judicial capacity and are bound to obey the law and act according to the ordinary rules of evidence; they can neither dispense with the requirements of the Act nor assume knowledge of particular facts not proved before them.

Examples of quasi-judicial decisions by Ministers.

Examples of quasi-judicial decision are easily found. Under Section 69, sub-sections (2) and (3), of the Housing, Town Planning, etc., Act, 1909,[251] the medical officer of health of a district must give to the medical officer of health of the county any information which it is in his power to give and which the medical officer of health of the county may reasonably require from him for the purpose of his duties prescribed by the Minister of Health. If any dispute or difference arises between the two medical officers under this section, it stands referred to the Minister of Health, whose

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[247] 11 and 12 Geo. 5, c. 51.
[248] [1909] 2 K.B. 1045; [1910] 2 K.B. 165; [1911] A.C. 179.
[249] 2 Edw. 7, c. 42.
[250] [1910] 2 K.B. at p. 178.
[251] 9 Edw. 7, c. 44; these sub-sections have not been repealed.

decision is final and binding. This is a perfect example of a quasi-judicial decision. It is the duty of the Minister to give both medical officers an opportunity to present their case to him—orally or not, as he thinks fit. It is his duty to ascertain the facts out of which the dispute arises by means of evidence adduced by the parties. The facts thus ascertained and the arguments of the disputants duly marshalled, it then becomes his duty to decide whether the requirements of the county officer are reasonable or not—a decision which can only be reached after considerations of medical policy in local administration have been taken into account. In the end the Minister makes up his mind what is *best* to do, and does it.

Under Section 19 of the Education Act, 1921,[252] it is the duty of the Board of Education to determine in case of dispute whether a school is necessary or not. The section provides that in so determining the Board shall have regard to the interest of secular instruction, to the wishes of parents as to the education of their children, and to the economy of the rates. All these are considerations of policy and the dispute cannot be determined without carefully weighing one against the others. Local Authority, parents, ratepayers must all have an opportunity of presenting their case and of adducing evidence under each of the three heads. All the facts must be ascertained, everybody's point of view must be judicially weighed, and care must be taken to do equal justice to the demands of education, parental convenience, sympathies and even prejudices, and not least—and yet not most—to the mundane claims of local finance. But when all this has been done, the question remains in ultimate analysis a question of policy and not a question of law; although it is difficult to imagine any question —whether of law or of policy—more essentially requiring a well balanced and in that sense a judicial mind.

The Board of Education[253] may appoint a person or persons to hold a public inquiry in the neighbourhood of the school for the purpose of hearing, receiving and examining any evidence and information offered, and hearing and inquiring into the objections or representations made respecting the necessity of the school. The person or persons so appointed must make a report to the Board in writing, setting forth the result of the inquiry and the objections and representations, if any, made thereat and any opinion or recommendations submitted by him or them to the Board. The Board must furnish a copy of the report to any local education authority concerned with the question of the necessity of the school, and, on payment of such fee as may be fixed by the

[252] 11 and 12 Geo. 5, c. 51.
[253] In practice the President thereof.

Board, to any person interested.[254] But in the end it is the Board of Education in London which has to decide whether the school is necessary or not.[255]

Under the Housing Act, 1925,[256] a Local Authority had power to make a scheme for the improvement of an unhealthy area. After the improvement scheme had been prepared and advertised and notices had been served on persons whose lands were proposed to be taken compulsorily for the purpose of the scheme, the Local Authority presented a petition to the Minister praying that an order might be made confirming the scheme. That the judicial element entered into the functions of the Minister upon receipt of the petition is shown by the requirement of the Act that the petition should state the names of any owners or reputed owners, or lessees or reputed lessees, who had dissented in respect of the taking of their lands, and by the further requirement that the petition should be supported by such evidence as the Minister might from time to time require. It was the duty of the Minister to consider the petition and to determine whether to confirm the scheme or not. Before confirming a scheme he caused a local inquiry to be held. Upon receipt of the report of the inquiry the Minister had to consider whether or not he was satisfied that the circumstances were such as to justify the making of the scheme and that the carrying into effect of the scheme either absolutely, or subject to conditions or modifications, would be beneficial to the health of the inhabitants of the area in question or of the neighbouring dwelling-houses. If he was so satisfied, but not otherwise, he might by order confirm the scheme with or without such conditions or modifications. If he made the order, it had effect as if enacted in the Act. It is clear that the Minister was bound to give full weight to the views of the dissentient landowners and that he was not entitled to make an order unless after considering the report of the inquiry in a judicial spirit he was satisfied that the scheme was such a scheme as the Act empowered him to confirm. But that done, he had a discretion whether to make the order or not, and in making the order he was exercising a legislative function.[257]

Some principles.

Judicial decisions.

9. It is obvious that the separation of powers is *prima facie* the guiding principle by which Parliament when legislating should allocate the executive and judicial tasks involved in its legislative plan. If the statute is in general concerned with administration,

[254] 11 and 12 Geo. 5, c. 51, s. 156.
[255] *See Board of Education v. Rice*, [1911] A.C. 179.
[256] 15 & 16 Geo. 5, c. 14, SS. 35, 36 and 38-40. These sections are repealed by the Housing Act, 1930 (20 and 21 Geo. 5, c. 39).
[257] *See Minister of Health v. The King (on the Prosecution of Yaffe)*, [1931] A.C. 494 at 532-3 per Lord Thankerton.

an executive Department should be entrusted with its execution; but if the measure is one in which justiciable issues will be raised in the course of carrying the Act into effect, and truly judicial determination will be needed in order to reach decisions, then *prima facie* that part of the task should be separated from the rest, and reserved for decision by a Court of Law—whether ordinary or specialised, as in the circumstances Parliament may think right.

It is only on special grounds that judicial functions should be assigned by Parliament to Ministers or Ministerial Tribunals. That there may be occasions where Parliament may rightly think the public interest best served by such assignment, we readily recognise; but Parliament when so deciding should still remember that such a legislative provision is exceptional in character—however numerous the individual cases may seem likely to be under the particular legislative scheme which gives rise to them. And this observation remains none the less true although in modern social legislation it may often be wise for Parliament to take the exceptional course; but to prevent misapprehension we add here that we distinguish between Ministers and Ministerial Tribunals, as will be seen in paragraph 10 below where we revert to the topic.

Quasi-judicial decisions.

But quasi-judicial decisions stand on a different footing. The presumption as to the correct legislative course is the other way; for a decision which ultimately turns on administrative policy should normally be taken by the executive Minister.

It is true that for the purpose of enabling a Minister to give a quasi-judicial decision it is frequently necessary for a public inquiry to be held—as, for example by an inspector of the Ministry of Health under the Housing Acts, 1925[258] and 1930,[259] or by an inspector of the Ministry of Transport under the Road Traffic Act, 1930[260]—and that such an inquiry is to some extent judicial. But the inquiry does not finally determine the rights of the parties affected; it is merely a first stage. The rights are determined at the second stage by the exercise of the Minister's discretion. He has to make up his own mind, after considering the report on the inquiry, about the appropriate action to be taken—for example, whether to confirm a clearance order or not,[261] or whether to modify the restrictions on the use of a road by public service vehicles or not.[262] In reaching a decision he must, of course, be actuated by the elementary principles of reason and justice; none the less his decision is not judicial but administrative.

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[258] 15 & 16 Geo. 5, c. 14.
[259] 20 & 21 Geo. 5. c. 39.
[260] 20 & 21 Geo. 5, c. 43.
[261] See s. 2 and the First Schedule of the Housing Act, 1930 (20 & 21 Geo. 5, c. 39).
[262] See s. 91 of the Road Traffic Act, 1930 (20 & 21 Geo. 5, c. 43).

The person holding the public inquiry never takes the final decision. He must be competent and impartial;[263] he must examine the evidence and the information offered, and he must do so critically and dispassionately; he must listen to representations and weigh objections; he may have to hear counsel; he must duly and faithfully report; and he may submit recommendations and tender advice:[264] but when he has done all this, his task is done, and the final decision has to be taken by the responsible Minister himself. Whilst this is the general position under present practice, we think that Parliament would be well advised to bear in mind the suggestion which we have already made in paragraph 3, that where in any legislative scheme it appears likely that in the course of its administration important issues will be raised calling for a judicial decision before the Minister takes his final decision and that the interest of the Department will be such as to disqualify the Minister from giving the judicial decision, the statute should itself provide for the segregation of judicial issues and their determination by an independent Ministerial Tribunal as a condition precedent to action by the Minister.

Judicial decisions involving administrative action or subordinate legislation.

Just as some elements of the judicial function may thus enter into activities which are mainly administrative, so where the problem is in essence or predominatingly judicial—i.e., not merely quasi-judicial—there may be executive or legislative elements involved in the performance of the particular judicial task, or so inseparably connected with it, that Parliament in working out its statutory plan will have to choose between (1) splitting the problem into two so as to leave the judicial side to a Court, whilst entrusting the non-judicial side to the Minister whose Department is concerned, and (2) assigning certain limited functions of an executive or legislative order to the Court charged with the judicial decision.

Impossibility of rigid separation of powers.

That such things should be done by Parliament need not shock the most rigid constitutional purist. The doctrine of the separation of powers is not sacrosanct. We have seen that the separation of powers is not and never was complete in England; and as the writers of the Federalist[265] truly said, "No skill in the science of government has yet been able to discriminate and define with

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[263] See s. 35 and the Schedule to the Electricity (Supply) Act, 1919 (9 & 10 Geo. 5, c. 100).

[264] *See R. v. The Minister of Transport: Ex parte Southend Express Carriers, Ltd., "The Times," 18th December,* 1931, where Mr. Justice Avory said that the Minister's representative who held an inquiry for the purposes of an appeal to the Minister under s. 81 of the Road Traffic Act, 1930 (20 & 21 Geo. 5, c. 43) did not dismiss the appeal but only made a report to the Minister, who dismissed the appeal.

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sufficient certainty its three great provinces, the legislative, executive and judiciary." The separation of powers is merely a rule of political wisdom, and must give way where sound reasons of public policy so require. Where a problem has a strongly marked judicial side, but it is difficult to detach the non-judicial side—be it administrative or be it legislative—Parliament may in some cases be well advised to entrust the whole to a Court of Law. If the particular task is not suited to the ordinary Courts of Law, it may properly be assigned to some special tribunal already existing, or to be newly-created for the purpose, which is better adapted in personnel or procedure.

Grant of administrative powers to a special Court.

A concrete illustration will help to make our meaning clear. The Mines Department of the Board of Trade has, broadly speaking, under statutory provisions the administrative duty of promoting the well-being of the mining industry of the country. One obstacle in the way of progress used to be the difficulty encountered in obtaining the right to work minerals held in private ownership, when the owner demanded unreasonable terms. Parliament might have delegated powers of individual legislation, in the nature of compulsory acquisition of land, to the Mines Department, and left to that Department the administrative work connected with carrying out such a policy. But it was obvious that the task of weighing up the rights of the proprietor, the needs of the mine-worker and the claims of the nation, as well as of settling the particular terms which would be fair, called not only for the exercise of impartial judgment, but also for the investigation of evidence and the ascertainment of complicated legal rights. It was reasonable, therefore, for Parliament by the Mines (Working Facilities and Support) Act, 1923,[266] to assign to a Court the function of deciding on each application the issue whether it was in the national interest that private rights should be so over-ridden, and if so on what terms of compensation.

But over and above these functions, some of which were purely judicial, there were the non-judicial functions of forcibly expropriating certain proprietors, and of framing principles of public policy regarding the nation's interest in the exploitation of its mineral resources to the best economic advantage, and in the maintenance of employment. Parliament might have taken the view that these questions of public policy were the proper business of the Mines Department. It did not, however, take that view and assigned the whole task to the Railway and Canal Commission Court, giving almost nominal duties to the Mines Department. As a result that Court has had to inquire into and form its own opinion on many questions of public policy, and its orders have a tripartite character, being legislative and administrative as well as judicial.

[266] 13 & 14 Geo. 5, c. 20.

And the constitutional experiment has by common consent worked well; indeed so well that in 1926 Parliament extended the scope of the Court's powers very widely.

The Railway Rates Tribunal constituted under the Railways Act, 1921,[267] and described above in paragraph 6, is another instance of the allocation by Parliament to a special Court of issues which are largely administrative, on the ground that they call for the exercise of high judicial qualities in balancing the claims of competing interests, in considering evidence and in appreciating legal principles.

Purely Judicial decisions.

Circumstances may justify the grant of judicial powers to Ministers or Ministerial Tribunals.

10. We quote these instances of the intentional refusal of Parliament to be trammelled by any theoretical rule about the separation of powers, in order to make good our point that well considered reasons of practical convenience based on experience may justify the converse case of the statutory grant of judicial powers to Ministers and Ministerial Tribunals. Whether they do or not cannot be answered by any *a priori* rule. The decision of Parliament must be reached in each individual piece of legislation, based on a consideration of all the circumstances of the particular legislative plan before it.

Such cases should be regarded as exceptional.

It is therefore clear that question (*a*) in paragraph 5 (viz., to what extent judicial functions should be entrusted to Ministers or to Ministerial Tribunals) cannot be answered by any general principle or formula enunciated in advance and to be applied in all cases, except that Parliament should always be extremely reluctant to entrust either Ministers or Ministerial Tribunals with purely judicial powers. In the rare cases where that course has to be considered, the decision of Parliament should normally depend on what is the dominant aspect of the problem or class of problem to be solved. It may on very exceptional grounds be necessary to leave certain judicial decisions to a Minister or other administrative authority. An illustration is afforded by the powers entrusted to the Insurance Commissioners in Sections 66 and 67 of the National Insurance Act, 1911.[268] It was anticipated that a very large number of questions would arise within a short period near the time of coming into operation of the Act and it was considered essential to the efficiency and smooth working of the scheme that decisions should be given promptly, and on a consistent plan for the whole country, without involving either elaborate machinery or great expense. Had the control of the whole matter not been left in the hands of the administrative authority, there might have been considerable risk of a breakdown by reason of the failure

[267] 11 & 12 Geo. 5, c. 55.
[268] 1 & 2 Geo. 5, c. 55.

of the independent authority entrusted with the judicial side of the work to keep pace with the administrative side of the work. But, *prima facie*, it is no part of an executive Minister's functions to act as a judge; and it is plain that as a general rule there will be little difficulty in providing for judicial decisions being entrusted to a Ministerial Tribunal instead of to the Minister personally, on the lines of Section 91 of the National Health Insurance Act, 1924.[269] *Ministerial Tribunals preferable.*

We recognise that such Ministerial Tribunals have much to recommend them. In cases where justice can only be done if it is done at a minimum cost, such Tribunals, which are likely to be cheaper to the parties, may on this ground be preferred to the ordinary Courts of Law. In addition they may be more readily accessible, freer from technicality, and—where relief must be given quickly—more expeditious. They possess the requisite expert knowledge of their subject—a specialised Court may often be better for the exercise of a special jurisdiction. Such Tribunals may also be better able at least than the inferior Courts of Law to establish uniformity of practice. *Their advantages.*

But while we recognise these advantages we repeat that such Tribunals should be set up only in those cases in which the conditions beyond all question demand it. It is in the ordinary Courts, higher or inferior, that justiciable issues, whether between subject and subject or between Crown and subject, ought as a rule to be determined.

Our question (*b*) in paragraph 5, viz. ("What are the right methods for the exercise of such functions?"), raises the whole problem of safeguards, with which we deal below; but we may say at once that on the judicial side of our enquiry we have come to the same conclusion as on the delegated legislation side, viz., that there is nothing radically wrong about the existing practice of Parliament, but that the system is capable of abuse, that dangers are incidental to it if not guarded against, and that certain safeguards are essential if the rule of law and the liberty of the subject are to be maintained.

The necessary safeguards.

11. We have already expressed the opinion in paragraph 9 that quasi-judicial functions should normally be exercised by Ministers themselves. On the other hand, we have recommended that purely judicial functions should normally be left to Courts of Law and that they should only be exercised by Ministers or Ministerial Tribunals in exceptional cases. Where either judicial or quasi-judicial functions are exercised by Ministers, or judicial functions

[269] 14 & 15 Geo. 5, c. 38.

by Ministerial Tribunals, the rule of law requires the following safeguards :—

Supervision by the High Court.

(*a*) (I) the maintenance of the jurisdiction of the High Court of Justice to review and, if necessary, to quash the proceedings on the ground that the Minister or the Ministerial Tribunal has exceeded the statutory powers and has therefore acted without jurisdiction;

(II) the existence of a simple procedure for the purpose;

Natural Justice.

(*b*) the vigilant observance by the Minister or the Ministerial Tribunal of the three principles of natural justice which we have enunciated in paragraph 3 above;

Publication of Inspectors' Reports.

(*c*) in every case in which a statutory public inquiry is held, the publication of the report made by the person holding the inquiry, subject only to the reservation that there may be exceptional cases, where on special grounds the Minister may hold that publication would be against the public interest (for further discussion of this point see paragraph 14 below),

Appeals on points of law.

(*d*) (I) the right of any party aggrieved by a judicial decision to appeal to the High Court of Justice on any question of law within a short stated time, and

(II) the existence of a simple procedure for the exercise of such right.

The supervisory jurisdiction of the High Court of Justice.

Necessity for the jurisdiction.

12. We do not think any will dispute that the jurisdiction of the High Court of Justice to quash the proceedings of inferior courts is important, and that its exercise is wholesome. That the jurisdiction should be no less vigilantly exercised in the case of a Minister or a Ministerial Tribunal than in the case of Courts of Law is clear.

Scope of the jurisdiction.

The scope of the High Court's supervision is well established by law. If a properly constituted inferior tribunal has exercised the jurisdiction entrusted to it in good faith, not influenced by extraneous or irrelevant considerations, and not arbitrarily or illegally, the High Court cannot interfere. When exercising its supervisory powers the High Court is not sitting as a Court of Appeal from the Tribunal, but it has power to prevent the usurpation or mistaken assumption by the Tribunal of a jurisdiction beyond that given to it by law, and to ensure that its decisions are judicial in character by compelling it to avoid extraneous considerations in arriving at its conclusion, and to confine itself to decision of the points which are in issue before it. Likewise a Minister or Ministerial Tribunal is not autocratic but is an inferior tribunal subject to the jurisdiction which the Court of King's Bench for

centuries, and the High Court since the Judicature Acts, has exercised over such tribunals.[279] That the jurisdiction extends to quasi-judicial, as well as to judicial functions, was expressly decided by the House of Lords in *Minister of Health* v. *The King* (*on the Prosecution of Yaffe*) [1931] A.C. 494.

We regard as essential the maintenance of this jurisdiction, and a simple and cheap access to the High Court in order to invoke it.

Simplification of procedure.

The existing procedure is in our opinion—already expressed in Section II—too expensive and in certain respects archaic, cumbrous and too inelastic. We therefore desire to repeat, and to apply in our present context, the recommendation which we have made in that Section in favour of the establishment of a simpler and less expensive procedure and one more suited to the needs of the modern age.

Vigilant observance of the principles of natural justice.

Procedure need not be identical with that of Law Courts.

13. It goes without saying that it is the duty of every Minister or Ministerial Tribunal, to whom the function of adjudication is assigned, to act judicially and to come to decisions in the spirit and with the sense of responsibility of a tribunal whose task it is to mete out justice. But it does not follow that the procedure of every such tribunal must be the same. In the case of a Court of Law the law itself prescribes certain rules to which the procedure must conform. In the case of a Minister or Ministerial Tribunal, so long as the principles of natural justice are observed, a certain degree of elasticity may be not only necessary but desirable.

We, therefore, recommend the observance of the following rules :—

Ministerial "Interest."

(*a*) In future legislation Parliament should proceed on the principle that no Minister (in which word we include any officer of a Minister acting under his orders) should give a judicial decision in any dispute in which the Minister has the kind of Departmental interest described in paragraph 3. If such cases appear likely to arise, Parliament should provide for determination of the dispute by a Ministerial Tribunal functioning independently of the Minister.

In any case in which it appears probable that a Minister may be disqualified by an interest of this kind from discharging impartially the judicial functions involved in a quasi-judicial decision, Parliament should entrust those functions to a Ministerial Tribunal that they may thus be discharged independently of the Minister as a condition precedent to his ultimate administrative decision.

The rights of the parties.

(*b*) Each of the parties to a dispute should be given the opportunity of stating its case—not necessarily orally—and should also

[279] See the judgment of Lord Justice Farwell in R. *v.* Board of Education, [1910] 2 K.B. 165 at 179.

be given the opportunity of knowing the case which it has to meet and of answering that case if it can.[271]

Reasoned decisions to be given.

(*c*) Any party affected by a decision should be informed of the reasons on which the decision is based; indeed it is generally desirable that the fullest amount of information compatible with the public interest should be given.

(*d*) Such a decision should be in the form of a reasoned document available to the parties affected. This document should state the conclusions as to the facts and as to any points of law which have emerged.

Where the decision has been preceded by a statutory public inquiry, if the Minister modifies the recommendations or rejects the findings of fact in the inspector's report, it is especially important that his decision should draw attention to his reasons for so doing.

The Ministry of Health have made considerable strides in this direction and specimens of letters conveying decisions will be found in the second of the companion volumes to our Report (Eleventh Day Evidence). We are of opinion that where the decision is quasi-judicial the present practice of conveying it in the form of a letter is quite suitable; but a purely judicial decision should always be embodied and notified to the parties in the form of a legal judgment.

The publication for general guidance, by the Ministry concerned, of leading cases is also to be commended subject to reasonable regard to considerations of expense, and here again the practice of the Ministry of Health is recommended to the attention of other Departments with similar duties.

Where the Minister's ultimate decision is based solely on his views of public policy, we recognise that the notification may properly be limited, so far as the ultimate decision is concerned, to a statement to that effect, but, so far as judicial elements are involved in the decision, the views we have already expressed about judicial decisions and the reasoned notification of them are applicable.

Publication of inspectors' reports.

Public inquiries.

14. Much public criticism has been directed to the prevalent procedure in connection with that class of Ministerial decision which is taken by the Minister after a public inquiry, local or other, pursuant to statutory powers has been held by one of the inspectors of the Ministry (e.g., of Health or Transport), and a report has been submitted by the inspector to the Minister.

[271] The case of the *West Midlands Joint Electricity Authority v. Pitt and others*: *Minister of Transport v. Same* (1931, T.L.R. 180), raised issues relevant to our terms of reference, but we do not cite any passage from Mr. Justice Macnaghten's judgment as the case is under appeal.

In particular we heard evidence from different angles on the subject of decisions taken by the Minister of Health after public local inquiries under the Town Planning Act, 1925,[272] and similar Acts.

We are aware that it is proposed in the Town and Country Planning Bill now before Parliament to repeal the Act of 1925, but the procedure is now more or less standardised, and the reference to that Act will serve our purpose.

Procedure of Inspectors.

That Act confers on the Minister of Health wide powers of authorising the appropriation or restriction of user of the subject's private property. When a town planning scheme is propounded, it is the practice of the Minister of Health to instruct an inspector to hold a local inquiry. The inspector fixes a hearing in the locality, when an opportunity is given to all interested parties to put their views and their evidence before him and the witnesses called on either side may be and often are cross-examined by the other side. In addition the inspector gathers information from other sources.

The inspector then makes his report to the Minister in the form of a confidential document; the report is then considered in the Department from the legal, financial, administrative and other aspects and the decision is finally taken by the Minister on consideration of all the relevant data, of which the facts reported by the inspector form only one part. The inspector's report itself may be partly fact and partly opinion.

Various criticisms have been made before us on this system.

It has been alleged that the inspector does not always act judicially, but that he supplements his formal inquiry by personal investigation, and that it is improper that any decision should be based on such information.

In the case of a public local inquiry held as preliminary to a judicial decision, it is in our opinion essential that the forms and methods appropriate to judicial proceedings should be strictly observed.

But when a public local inquiry is held as preliminary to a quasi-judicial decision by a Minister it is not reasonable or practicable that the inspector should be entirely bound by the practice of Courts of Law. He is not inquiring solely into facts or law; he is not as a rule a lawyer and while his main function is to ascertain facts it is sometimes his duty to form his own views on public policy or at any rate to weigh all the circumstances in terms of public policy. Although the final decision is not taken by him, to make the inspector's inquiry purely legal and formal might defeat its purpose. We recommend, however, to the study of other Departments the instructions issued by the Ministry of

[272] 15 & 16 Geo. 5, c. 16.

Health to inspectors (of which a copy will be found in the second of the companion volumes to our Report : Eleventh day Evidence) with a view to securing that in the conduct of their inquiries they shall pursue the methods of natural justice.

It should be clearly realised that these instructions are not an immutable code, but form a set of instructions for the general guidance of a body of responsible officials, and that the inquiries are of so various a character and the issues so diverse that rigid adherence to the text in all cases must be conditioned by the need of attaining the objects of the inquiry, viz., the ascertainment of facts and the presentation of views for the assistance of the Minister in arriving at his decision.

Another line of complaint is that one officer (the inspector) holds the inquiry and another (who is unknown) gives the decision, and it has been suggested either that the inspector should himself decide the case or that whoever decides it in fact should be designated by name and should hold an open public inquiry at which presumably the inspector's report would be part of the evidence.

On the other hand complaints have been made that decisions are not made by the Minister himself or by a very high official but by subordinate officials.

Some of these complaints contradict each other and some of them appear to be based on a confusion between the substance and the forms of justice.

Conflict of judicial opinions on publication of reports.

The publication of inspectors' reports was much discussed in all Courts in the case of *Rex* v. *Local Government Board Ex parte Arlidge*[273] and led to a remarkable conflict of judicial opinion, as the following reference to the judgments will show :—

(1) In the King's Bench Division Bankes J. expressed the opinion that it would perhaps add to the public confidence in these

[273] [1913] 1 K.B. 463; [1914] 1 K.B. 160; and (*sub nom.* L.G.B. *v.* Arlidge) [1915] A.C. 120. A Borough Council had in pursuance of their right and duty under Section 17 of the Housing, Town Planning, etc., Act, 1909 (9 & 10 Geo. 5, c. 35), refused to determine a closing order in respect of a dwelling house in the borough and Mr. Arlidge, the assignee of the lease of the dwelling house, had exercised his right under the section to appeal to the Local Government Board. It was provided by Section 39 of the Act that the Board should not dismiss any appeal without having first held a public local inquiry. The Board dismissed Mr. Arlidge's appeal after holding such an inquiry. Mr. Arlidge applied to the High Court of Justice to quash the order of the Board dismissing the appeal on the ground that the appeal had not been determined in the manner provided by the Law. One of the points taken was that the report of the inspector who held the inquiry was not disclosed to Mr. Arlidge. The High Court refused to quash the order. Their decision was reversed in the Court of Appeal but restored by the House of Lords. The House of Lords, disagreeing with the majority of the Court of Appeal, held unanimously that an appellant was not entitled as of right, as a condition precedent to the dismissal of his appeal, to see the report made by the Board's inspector upon the public local inquiry.

inquiries if the reports of the inspectors were not always treated as confidential documents;

(2) In the Court of Appeal Vaughan Williams & Buckley L.J.J. held that the non-production of these reports was contrary to the principles of natural justice on which English Law is based;

(3) Hamilton L.J., while saying that, if it was the function of the Court of Appeal to advise the Local Government Board as to its procedure, or to criticise the procedure actually adopted, he should for his part suggest that the Board should let the parties see the inspector's report, declared that he could not but feel that all that could be urged against the Local Government Board might be still more forcibly urged against the Court of Criminal Appeal;

(4) In the House of Lords the Lord Chancellor (Lord Haldane) said that it might or might not have been useful to disclose the report;

(5) Lord Shaw of Dunfermline inclined to hold that the disadvantage in very many cases would exceed the advantage of such disclosure;

(6) Lord Parmoor held that non-disclosure was not inconsistent with substantial justice;

(7) Lord Moulton was unable to see any reason why the reports should be made public and expressed the opinion that their publication would cripple the usefulness of the inquiries and that the practice would be decidedly mischievous.

The existing practice is for the Departments to regard the inspector's report as a confidential document for the information of the Minister, and only to publish it where there are special reasons for such a course.

Arguments against publication.

In support of this existing practice the following arguments may be advanced:—

(*a*) Inspectors' reports of the kind now in question are only a step, and only one of many steps, in the process of reaching a Ministerial decision and are in no different position from any of the other steps. The inquiry and the report are preliminary steps; and the inspector's report is only one factor in the Minister's ultimate decision, which in most cases is executive. The constitutional position is thus different from that of an inquiry and a report, for example into a factory explosion or a railway accident, where the inquiry culminating in a report is an end in itself, being primarily held not as a preliminary to a Ministerial decision, but for the specific object of finding out facts for the information of the public. In the latter kind of case publication of the report is the normal and natural sequel to the holding of the inquiry; in the former it is argued that to make the publication of the report the regular practice is to impair the confidential relationship between the official of the Ministry and his Minister, and that this relationship is one of the most valuable assets of the public service.

(*b*) If the report is published as a matter of course there will be strong pressure to make its findings conclusive and to take that course will defeat the intentions of Parliament by giving the real power and duty of executive decision to an official instead of to a Minister responsible to Parliament. It is also pointed out that in many cases no inquiry ever takes place and it is urged that in such cases, if publication of reports is the rule, there will be strong demands for the production by the Ministry of some other document to demonstrate the evidence on which the Minister has acted.

(*c*) The inspector who holds an inquiry preliminary to a Minister's decision is not solely concerned with the elucidation of facts but is entitled and expected to give confidential advice to his Minister as to the form which the decision should take. Such advice—which may, of course, conflict with advice tendered by other advisers—should, so it is said, no more be made public than should be the minutes on the Departmental file written by various branches of the Department; and if a general rule is made that reports are to be published it will be necessary for the published report to be accompanied by a further confidential report for the eye of the Minister and his Department alone—a procedure which would it is urged be not only unfair to the public, but a direct cause of public dissatisfaction.

(*d*) The present system has the full confidence of the public as is shown by the evidence submitted to your Lordship's Committee, and to tamper with the system for theoretical reasons is to run a very grave risk.

Arguments for publication.

As against these arguments the following considerations have weight.

There is a demand for publication, even from witnesses like the representative of the Surveyors' Institution who spoke most warmly in commendation of the impartiality of the inspectors of the Ministry of Health and the public confidence felt in the Civil Servants of that Ministry. We think that there is real substance in the demand. The primary object of such an inquiry no doubt is to inform the mind of the Minister who has ultimately to determine the matters at issue. But that is not the whole story. The inquiry is given a particular form and character for the purpose, presumably, of satisfying those whose interests may be involved that all relevant facts and considerations will be put fairly and impartially before the Minister, so that he may be in a position to arrive at a just decision. If the report giving the results of the inquiry passes into the Department and is seen by no one but the Minister and his confidential advisers doubt may well arise as to whether a true picture has been conveyed to the Minister's mind. We are told that such doubts have arisen and, whether they are justified or not, the existence of any public misgiving constitutes a good reason for removing, if it be possible, an obvious weakness in the system.

We are not satisfied that an extension of the practice of giving reasons for decisions would really meet the demand for publication of inspectors' reports. The reasons with which the Minister of Health accompanies his decisions, as illustrated by the examples furnished to us, are, in the main, reasons of policy, and the facts and arguments brought forward at the antecedent inquiry are referred to only so far as may be necessary to render the statement intelligible. There is no attempt, and nothing approaching an attempt, to summarise the evidence or balance the arguments; indeed we are satisfied that it would be quite impracticable to do so. These reports in many cases run to great length and deal with a great volume of evidence and much argument. If the question is whether such a report has given a true picture, it cannot be answered by a short description or by the communication of extracts but only by the exhibition to the critics of the picture itself. Moreover, non-publication, in cases where the decision does not appear to square with the outcome of the inquiry, may readily expose the Inspector to the quite unfair suspicion of having failed to do justice to his task.

Committee's general conclusion in favour of publication.

To these various arguments for and against publication we have given prolonged consideration, and on balance have come to the conclusion that publication is right. By that we do not mean that the expense of printing a long report should in every case be incurred; but that in all cases the report of the inspector should be made available to the parties concerned and to the Press, and in important cases should be officially published by the Department responsible for the inquiry.

We fully appreciate the importance of not undermining the confidential relationship between the Minister and his officials and however strong the case for publication in order to allay a public suspicion, we should, in the public interest, resist the demand for publication if any such consequence were in our judgment likely to ensue.

Confidential reports.

We have considered the question whether the inspector or other person who holds the public inquiry should be entitled to make a confidential report to the Minister in addition to the report for publication. In our opinion this should never be done in the case of an inquiry preliminary to a judicial decision. If judicial decisions are to be given by Ministers at all, it is essential that they should be given as far as possible in accordance with the forms of justice and that nothing should reach the ears of the judge behind the backs of the parties. Most inquiries however are held in connection with quasi-judicial decisions and in the case of such inquiries we do not take so strict a view. Whilst we think that there should be no confidential reports on those matters of fact or law which come strictly within the scope of the report of the inquiry, we see no objection to the tendering by separate report

or otherwise of such advice as the Minister may call for on any questions of Ministerial policy which may be involved.

Publication should be with the decision.

We have heard the objection made to the publication of the inspectors' reports that it might lead to a demand for a re-hearing by way of appeal of the questions upon which evidence was taken at the inquiry, and that, for obvious reasons, there ought to be finality in such matters. With the last point we entirely agree, but we do not fear any such result from the publication of inspectors' reports. We do not recommend that there should be any further investigation of the facts after a full public inquiry. Indeed our view would be met if the inspector's report were communicated with the Minister's decision to the parties concerned.

In certain cases, the Minister's decision may be influenced not only by reasons of law or public policy which lie entirely outside the field of the public inquiry, but by information which reaches him through channels other than the inspector's report. We do not think there is anything improper in this; but when it happens, and the Minister feels it right to make a decision which is against the weight of evidence at the inquiry, we are of opinion that he should, in communicating his reasoned decision, include a statement as to the nature of the extraneous evidence by which he has been influenced, and thereby remove at least one possible source of misunderstanding and suspicion.

Limitations to Committee's recommendation.

We do not wish to be misunderstood as recommending the adoption of any general rule that reports submitted by inspectors to their Ministers should be made available to the public. That is very far from our intention. Our recommendation is to be considered as limited to those cases where a public inquiry of a judicial character has been prescribed by Parliament as a step in the process of arriving at a judicial or quasi-judicial decision. It matters not for our purpose whether the holding of such an inquiry is enjoined by the relevant statute in every case or only where certain specified conditions are satisfied or whether it is merely indicated as a step which may be taken if the Minister in his discretion thinks fit so to direct. So long as (*a*) the ultimate decision is judicial or quasi-judicial and (*b*) the inquiry, if one is held, must partake of a definitely judicial character, our recommendation that the report should be published is applicable. This conclusion follows, as indicated above, from what in our view must be presumed to be the object of Parliament in providing for a public hearing of the parties in such cases as we have in contemplation.

Inquiries not preliminary to judicial or quasi-judicial decisions.

Our recommendation has no application to those cases where the Minister in the ordinary course of administration may arrange for some local inquiry or investigation, the better to inform his mind before he takes some decision which is within his competence as the head of an executive Department. In such cases the Minister, having full discretion to arrive at his decision in his own way, should

be entirely free to deal as he thinks fit with such reports as may be made to him. The ordinary processes of administration might indeed be gravely impeded were the Minister to be tied down to any particular procedure and the fact that the Minister may be armed by statute with a general power to proceed by way of local inquiry in suitable cases makes no difference so long as the matter is in essence administrative.

Border-line cases.

There may, no doubt, arise from time to time border-line cases in which a judicial element begins to creep into the process of administration. The procedure in such cases should, we suggest, be left for settlement by the Minister according to the spirit of our recommendation, which we think we have for all practical purposes sufficiently defined in the foregoing paragraphs.

A quotation from Lord Sumner.

15. Before we leave the subject of the procedure to be followed in the administration of Ministerial justice we desire to quote *in extenso* some observations made by Lord Justice Hamilton (now Lord Sumner) in his judgment in *Rex* v. *Local Government Board, Ex parte* Arlidge,[274] to which we have already referred :—

Desirability for open procedure.

" If it was our function to advise the Local Government Board as to its procedure generally, or to criticise the procedure actually adopted as such, I should for my part suggest that the more open the procedure is the better. By all means let both the appellant and the Local Authority see the inspector's reports; a discreet and careful officer is not likely to offend, and if, in spite of discretion and care, he is harassed by actions for libel he may well be defended and indemnified by his Department. By all means let the appellant, and the Local Authority too, if it wishes, see and address the judge, it is all in his day's work. By all means let the appellant have the last word and as many of them in reason as he likes. Time spent in removing a grievance or in avoiding the sense of it, is time well spent, and the Board's officials will, like good judges, amplify their jurisdiction by rooting it in the public confidence."

The learned judge was speaking strictly with reference to a particular form of appeal to the Local Government Board under the Housing, Town Planning, etc. Act, 1909.[275] We recognise that the public interest and the exigencies of administration may prevent the literal application of his words to all judicial and quasi-judicial proceedings before Ministers and to all judicial proceedings before Ministerial Tribunals; but we accept their spirit and commend them to the notice of all who are charged with the duty of dispensing Ministerial justice.

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[274] [1914] 1 K.B. 160 at 203-4.
[275] 9 Edw. 7, c. 44.

Right of appeal on points of law.

Right of appeal essential.

16. In our opinion the maintenance of the rule of law demands that a party aggrieved by the judicial decision of a Minister or Ministerial Tribunal should have a right of appeal from that decision to the High Court on any point of law. In matters which really pertain to administration, jurisdiction is often appropriately assigned to Ministers or Ministerial Tribunals rather than to the ordinary Courts of Law, but we see no justification for sheltering them from the Courts of Law in so far as the exercise of their jurisdiction involves a judicial decision; and we are of opinion that to confer such immunity upon them is contrary to the constitutional principle underlying the rule of law.

Suggestions for simplified procedure.

It is, in our opinion, of great practical importance that a uniform and simple procedure should be established for all such appeals. In general

(*a*) the time within which appeals may be brought should be strictly limited;

(*b*) the appeals should be determined in a summary manner;

(*c*) the appeal should be to a single judge of the High Court, and the question of appropriating particular judges for such cases (on the lines of the Commercial Court and revenue cases) should be considered;

(*d*) the decision of the High Court on an appeal should be final.

But we recognise that there may occasionally be legal questions of unusual importance, and for these we would give the High Court and the Court of Appeal power to give leave to appeal further.

Appeals on questions of fact.

Appeal on issues of fact generally undesirable.

17. While we are of opinion that there should be an absolute and universal right of appeal to the High Court on any point of law from the judicial decision of a Minister or a Ministerial Tribunal, we are satisfied that there should as a rule be no appeal to any Court of Law on issues of fact. We recognize, however, that very exceptionally it may be desirable that the statute conferring the powers of adjudication on the Minister or Ministerial Tribunal should provide for an appeal on issues of fact to a specially constituted Appeal Tribunal. Such an Appeal Tribunal might, we would suggest, consist of three persons, of whom one should be a barrister or solicitor of not less than seven years' standing, who would be the chairman of the Tribunal. The Lord Chancellor should appoint or concur in the appointment of its members, and

Possibility of exceptions to this rule.

also be empowered to make regulations with respect to the procedure of such an Appeal Tribunal and especially to provide by his regulations for the speedy determination of appeals.[276]

We are definitely opposed to any right of appeal from an administrative decision whether it contains a judicial element or not.

Judicial Decisions; distinction between Ministers and Ministerial Tribunals.

18. Without modifying the view already expressed that the presumption should always be in favour of using the ordinary Courts, we are of opinion that where Parliament is satisfied that certain judicial issues arising out of the administrative work of a Department are not suitable for decision by the ordinary Courts, Parliament should, in the absence of any exceptional reason for referring them to the decision of the Minister himself, provide for their reference to an independent person or persons, not being an officer or officers of the Department concerned.[277] If such issues are likely to arise with any frequency in any class of case it might be well for Parliament to constitute a permanent specialised Tribunal to deal with cases of that class. The decisions of any such Tribunal, whether permanent or appointed *ad hoc*, should be independent of the Minister; but we see no reason for disturbing the existing practice of appointment by the Minister, except that in the case of the more important appointments we think the Lord Chancellor should be consulted.

Desirability of independent Tribunals.

Procedure and appointment of such Tribunals.

Section 16 of the Import Duties Act, 1932,[277a] which provides for the settlement by arbitration of any dispute as to the value of goods subjected to duty, affords an interesting illustration of the present attitude of Parliament to the subject of judicial decisions upon questions arising out of the administration of a taxing statute. The dispute is referred to a single referee: that referee is appointed by the Lord Chancellor; all officials of Government Departments are disqualified for the office: and no appeal on fact or law is allowed. We thus have recognition by Parliament of the need of a special tribunal which will become specially experienced in the technique of the subject assigned to its jurisdiction; of the importance of quick

Recent example of an independent Tribunal.

[276] The provisions of the Schedule to the War Pensions (Administrative Provisions) Act, 1919 (9 & 10 Geo. 5, c. 53), which regulate the constitution, jurisdiction and procedure of Pension Appeal Tribunals might be adapted.

[277] See also above paragraph 10, at page 97.

[277a] 22 Geo. 5, c. 8 (described in Section II, paragraph 8, at page 35). A similar provision will be found in the Safeguarding of Industries Act, 1921 (11 and 12 Geo. 5, c. 47), the Abnormal Importations (Customs Duties) Act, 1931 (22 Geo. 5, c. 1), and the Horticultural Products (Emergency Customs Duties) Act, 1931 (22 Geo. 5, c. 3), all of which Acts are also referred to in that paragraph.

finality: and of the absolute independence of the tribunal from the Executive.

Inexpediency of establishing a system of administrative law.

Mr. Robson's proposals not endorsed.

19. Mr. W. A. Robson has put before us detailed proposals for the establishment of a system of administrative Courts and administrative Law independent of Ministers as the best remedy for the defects of the existing system to which our terms of reference are directed. We have considered their expediency, but interesting as they are, we cannot recommend their adoption; in our view they are inconsistent with the sovereignty of Parliament and the supremacy of the Law.

Under the existing system Ministers are subject in the exercise of judicial and quasi-judicial functions to the supervisory jurisdiction, and we propose that in future in the exercise of their judicial functions they should also be subject to the appellate jurisdiction of the High Court; while on questions of policy a Minister in the exercise of his quasi-judicial functions will remain subject to control by Parliament and to the influence of public opinion with which he is in daily contact and to which he is highly sensitive.

A regularised system of administrative Courts and administrative Law, such as Mr. Robson proposes, would involve the abolition of both the supervisory and the appellate jurisdiction of the High Court in matters pertaining to administration; and we believe that it would result in the withdrawal to a great extent of those judicial activities, which are inseparable from administration, from the influence of public opinion.

We, therefore, without hesitation advise against its adoption.

The Lord Chief Justice has himself expressed the opinion in Chapter III of "The New Despotism"[278] that "*droit administratif*" is completely opposed to the first principles of our Constitution.

Administrative Law in France.

The truth of this observation is clearly illustrated by the history of the system of administrative Law existing in modern France.

Before the French Revolution the "*Parlements*", which were primarily courts of justice, were also administrative bodies, while the Royal "*Intendants*", who governed the Provinces, exercised judicial functions. In 1790 the Constituent Assembly, eager to destroy all traces of absolutism, created a new Constitution which was based on the separation of the legislative, executive and judicial powers in the State. One of the consequences of the separation was that while the Courts were made wholly independent of the Administration, the Administration was made wholly independent of the Courts This administrative independence gave

[278] Page 41.

rise to much dissatisfaction and it was to allay this dissatisfaction that Napoleon gave the right of recourse to the "*Conseil d'Etat*" in the case of alleged irregularities on the part of the administration. A few years later he established a special committee of the "*Conseil d'Etat*", called the "*Comité du Contentieux*", for the purpose of hearing the complaints and tendering advice to the Government. The complainants were allowed the privilege of being represented by officials specially appointed for the purpose and known as "*Avocats au Conseil*". In 1831, after the second fall of the Bourbons, an oral hearing was granted, and in 1849, after the final collapse of the monarchy, the "*Commission du Contentieux*", as it was now called, was permitted to give judgments instead of merely tendering advice. The system thus established has flourished ever since—alike under the Second Empire and under the Third Republic.[279]

It is obvious that this system is wholly inapplicable in the United Kingdom with its flexible unwritten Constitution under which there is no clear-cut separation of powers and the administration is subject to the almost daily supervision of the Courts of Law, as every reader of the daily law reports in "The Times" newspaper knows.

The question was discussed by Professor Dicey in an article entitled "The Development of Administrative Law in England" in the Law Quarterly Review for April, 1915.[280] His conclusion was that although modern legislation had conferred upon the Cabinet, or upon servants of the Crown who might be influenced or guided by the Cabinet, a considerable amount of judicial or quasi-judicial authority, the fact that the ordinary Law Courts could deal with any actual and probable breach of the law committed by any servant of the Crown still preserved that rule of law which was fatal to the existence of true *droit administratif*.[281] In our opinion Professor Dicey's conclusion is no less true to-day than it was in 1915.

Protection of the subject.

But continental jurists who support the system of administrative law as it prevails generally in Europe—for instance in France

[279] The question whether a given case, or a point arising in a given case, falls within the jurisdiction of the Judicial Courts or of the *Conseil d'Etat* has since 1872 been decided by the *Tribunal du Conflit* which contains members drawn in equal numbers from the *Conseil d'Etat* and from the *Cour de Cassation*, the highest judicial Court in France. See "the Law of the Constitution" by A. V. Dicey (eighth edition, 1915), pages XLIV to XLV and 360-361.

[280] Vol. XXXI, p. 148.

[281] Compare "The Law of the Constitution," by A. V. Dicey (eighth edition, 1915), page XLVII:—"The slightly increasing likeness between the official law of England and the *droit administratif* of France must not conceal the fact that *droit administratif* still contains ideas foreign to English convictions with regard to the rule of law and especially with regard to the supremacy of the ordinary Law Courts."

—protest strongly against the claim that the rule of law as practised in England gives the subjects of the King a perfect protection of their legal rights; indeed, they urge that in practice that protection is not as good as that afforded by the " droit administratif " of the Continent.

It must be admitted that the French system does give protection to the French subject against the arbitrary acts of the public service, as is lucidly shown by that distinguished French lawyer, M. Henry Berthélemy, in a recent article " sur les pratiques administratives anglo-saxonnes comparées au droit administratif francais."[282]

French criticism of the privileged position of the Crown in English Law.

We are bound also to confess that Continental critics are justified in their contention that under the rule of law in England the remedy of the subject against the Executive Government is less complete than the remedy of subject against subject. This branch of the argument in favour of establishing a system of administrative Law in England falls outside the scope of our reference, but since we are reporting against the establishment of such a system we think we should not be doing our duty if we were to ignore it altogether.

The main defects in the subject's remedies against the Executive Government are :—

(*a*) That owing to the peculiar procedure in cases in which the Crown is litigant the subject is to some extent placed at a disadvantage;

(*b*) That there is no effective remedy against the Crown in the County Court;

(*c*) That the Crown is not liable to be sued in tort.

The Crown Procedings Bill.

In 1921 the whole position of the Crown as litigant was referred by Lord Birkenhead (then Lord Chancellor) to a Committee presided over by Sir Gordon (now Lord) Hewart, the present Lord Chief Justice, then Attorney General.

In 1924, before the Committee were able to bring to a conclusion their necessarily prolonged enquiries, Lord Haldane (then Lord Chancellor) requested them to prepare a Bill " on the assumption that it was both desirable and feasible to remedy these defects."

The Committee reported in 1927 and submitted a draft Bill prepared by them in accordance with Lord Haldane's Minute.[283]

While it is no part of our duty to make any recommendation as to the expediency of passing such a Bill into law, we think that it is only right that we should point out that there is this lacuna in the rule of law, which will still remain even if our recommendations are wholly carried out, and that the passing of such a Bill would fill the lacuna.

[282] Bulletin Mensuel de la Société de Législation Comparée Nos. 4-6—Avril-Juin, 1931. We are indebted to this article for the historical résumé at the commencement of this paragraph.

[283] Cmd. 2842.

Judicial proceedings before Ministers and Ministerial Tribunals and the Law of Libel and Slander.

20. It is in English law an incidental attribute of judicial proceedings that defamatory statements made in their course cannot be made the subject of an action for libel or slander. This protection is known as the rule of "absolute privilege." It applies wherever the proceeding is strictly judicial and the Court is performing strictly judicial functions.[284] The rule has been held to apply to a Coroner's Court, a Military Court of Enquiry, an Ecclesiastic Commission under the Pluralities Acts and the Disciplinary Committee of the Incorporated Law Society. But there are definite limits within which the decisions of the Courts have restricted the immunity so conferred and the line of limitation is not always easy to trace.[285]

We do not conceive it to be within our terms of reference to investigate this legal borderland or to attempt to codify the law on the subject. Nor do we think it within those terms to make any recommendations for legislation thereon in connection with the judicial and quasi-judicial decisions which are the subject of this section of our report. But we have thought it right to draw attention to the question in view of the grounds of public policy upon which the protection is founded.

Summary.

21. We have now surveyed the field of judicial and quasi-judicial decisions by Ministers and of judicial decisions by Ministerial Tribunals, and it only remains to summarise our conclusions and recommendations.

Fundamental necessity of maintaining the rule of Law.

We assume the fundamental necessity of not only maintaining but strengthening the supremacy of the Law. We recognise that this involves the equal subjection of all classes to regular Law

[284] See Fraser on the Law of Libel and Slander (1925, 6th Edition), p. 187, for a clear and compendious statement of the law on the subject and reference to the decisions mentioned in paragraph 20.

[285] *In Collins* v. *Henry Whiteway & Co.* [1927] 2 K.B. 378, Mr. Justice Horridge laid it down that the Court of Referees merely discharged administrative duties which need not be performed in Court, although in respect of them it was necessary to bring to bear a judicial mind. It was an action of libel and the defence of absolute privilege was argued. That depended, in view of the facts upon which the argument proceeded, on whether the proceedings before the Court of Referees were so strictly judicial in character as to make the occasion one of absolute privilege with its consequence of immunity from liability to an action for libel or slander in respect of a statement made in the course of the proceedings even although malicious. He held that they were not. It would seem that in describing the duties of the Court of Referees as "administrative" the learned Judge was using the word loosely as meaning "not purely judicial," for the purpose of distinguishing the functions of such a departmental tribunal from those of a Court in the full sense.

administered by the ordinary Courts of Law and that such authority in the judicial as in the legislative sphere as Parliament may judge expedient to concede to the Executive must be consistent with that subjection. We are, therefore, unanimously of opinion that no considerations of administrative convenience, or executive efficiency, should be allowed to weaken the control of the Courts, and that no obstacle should be placed by Parliament in the way of the subject's unimpeded access to them.

Legislation excluding purely judicial decisions from the Courts should be regarded as exceptional.

We, therefore, take the view that all legislation which excludes purely judicial decisions from the jurisdiction of the Courts of Law, and entrusts them exclusively to tribunals which it deems to be specially qualified to determine them should be definitely regarded as exceptional; and that the introduction of any such legislative proposals should be jealously scrutinised by Parliament.

Instances of the exceptioual course.

In the past Parliament has thought fit on various occasions to take the exceptional course: it is no part of our duty to pronounce judgment on individual statutes and we do not therefore express any opinion on those instances. We have for example drawn attention to the great measure of power which Parliament in the middle of the last century conferred on the General Medical Council to discipline the medical profession; as we have already said, this particular matter is outside our terms of reference, and we refrain therefore from any comment on so extreme an instance of the exclusion of justiciable issues from the jurisdiction of His Majesty's judges. We again mention it merely for the purpose of showing that it is not only within the sphere of the central administration of the State that legislation has been passed with this trend.

It is hardly necessary to observe that Ministers and Ministerial Tribunals—so far as the United Kingdom is concerned—enjoy no powers of judicial decision except those conferred on them by Act of Parliament.

Distinction between judicial and quasi-judicial.

Our terms of reference distinguish between those powers which are purely judicial and those which are quasi-judicial only. Both involve a dispute between parties, the presentation by the parties of their case, and the ascertainment of the facts underlying the dispute by means of evidence adduced by the parties themselves. But a judicial decision is one which must be based on the application of the law of the land to the facts so ascertained; whereas in the nature of things that can never be the basis of a quasi-judicial decision. For a quasi-judicial decision involves considerations of public policy, and in the last resort the decision is not a decision as to the respective legal rights and obligations of the parties, but a decision as to what it is in the public interest to do. The distinction is well illustrated by two instances which we have quoted of the powers and duties of the Board of Education under the Education Act, 1921.[286] Under Section 19 it is the duty of the Board of Education to determine in case of dispute whether a school is necessary or not. That question clearly cannot be determined

[286] 11 & 12 Geo. 5, c. 51.

by any application of the law of the land to the ascertained facts. When all the facts have been ascertained and the contentions of the disputants have been appreciated, the question in the last resort is a question of public policy. On the other hand, if a question arises under Section 29 between the local education authority and the managers of a school not provided by the authority as to whether the authority is discharging its duty under the section to maintain the school and keep it efficient, the decision of that question which the Board is obliged by sub-section (9) of the Section to take is a strictly judicial decision, namely whether on the true view of the facts the authority is obeying the law or not.

Quasi-judicial decisions.

We have expressed the opinion that quasi-judicial decisions fall properly within the province of executive Ministers, who are responsible for policy and should control, direct and administer it, and that such decisions should not ordinarily be assigned to any tribunal other than the Minister. But we have also expressed the opinion that they should be inspired by the spirit and governed by the methods of justice; and that the procedure should be accompanied by as much publicity as may be.

Judicial decisions.

As regards judicial decisions we have expressed the opinion that it is only for exceptional reasons that they should be assigned by Parliament to Ministers or Ministerial Tribunals.

When they are so assigned, we are of opinion that they should seldom, if ever, be entrusted by Parliament to the Minister himself, and that a specialised Tribunal should be created for the purpose of exercising the judicial powers if there is no existing Tribunal on which they can be conveniently conferred.

We recognise that there are exceptional cases in which well considered reasons of practical convenience may justify the statutory grant of judicial power to Ministerial Tribunals; that no *a priori* rule can be laid down for distinguishing between one case and another; and that the decision of Parliament must be based on a consideration of all the circumstances of the particular plan of legislation before it.

General conclusion.

Our conclusion on the whole matter is that there is nothing radically wrong about the existing practice of Parliament in permitting the exercise of judicial and quasi-judicial powers by Ministers and of judicial power by Ministerial Tribunals, but that the practice is capable of abuse, that dangers are incidental to it if not guarded against, and that certain safeguards are essential if the rule of law and the liberty of the subject are to be maintained.

Recommendations in regard to judicial and quasi judicial decisions.

Judicial decisions normally for Courts of Law.

22. We, therefore, make the following specific recommendations:—

I. Judicial, as distinct from quasi-judicial, functions should normally be entrusted to the ordinary Courts of Law, and their

assignment by Parliament to a Minister or Ministerial Tribunal should be regarded as exceptional and requiring justification in each case.

Where exceptions are necessary, Ministerial Tribunals are preferable.

II. Where Parliament considers it necessary to depart from the normal course, it should entrust the judicial functions involved in the legislation to a Ministerial Tribunal rather than to the Minister personally. The appointment of such a tribunal may be left to the Minister, but the tribunal should be independent of him in the exercise of their functions. In regard to the more important jurisdictions so set up, the Lord Chancellor should be consulted before appointments are made.

Assignment to a Ministerial Tribunal rather than to the Minister would clearly be right in any case where it appears likely that the Minister (in which word we include any officer of the Department acting under his orders) would be likely to be precluded from acting as a judge by the kind of Departmental " interest " described in paragraph 3.

Judicial functions should not be entrusted to the Minister personally unless there is some very special and exceptional reason for that course and even in that event not where there is " interest " of the kind last-mentioned.

Quasi-judicial decisions naturally left to Ministers subject to exceptions.

III. Quasi-judicial decisions fall naturally to Ministers themselves and not to Courts of Law or Ministerial Tribunals. But in any exceptional case in which it appears probable that a Minister may be disqualified by an " interest " of the kind last-mentioned from discharging impartially the judicial functions involved in the quasi-judicial decision, Parliament should consider the desirability of dividing the decision and entrusting the judicial functions to a Ministerial Tribunal whose adjudication would be binding on the Minister when in his discretion he completes the quasi-judicial decision by administrative action.

The rights of the parties

IV. Before the decision is given, whether it be judicial or quasi-judicial, each of the parties to a dispute should be given the opportunity of stating his case (not necessarily orally) and also of knowing the case which he has to meet and of answering it if he can.

Reasoned decisions to be given.

V. Every Minister exercising a judicial or quasi-judicial function and every Ministerial Tribunal exercising a judicial function should give the decision in the form of a reasoned document.

This document should be available to the parties. Where the decision is purely judicial, it should take the form of a judgment; but where it is quasi-judicial, the specimen letters conveying decisions of the Minister of Health seem to us to be suitable for their purpose and as a precedent they might be generally used.

The practice of the Ministry of Health in publishing epitomes of leading cases for public guidance should be generally adopted.

Publication of Inspectors' Reports.

VI. In any case in which a statutory public inquiry is held in connection with the exercise of judicial or quasi-judicial functions by Ministers, the report made by the person holding the inquiry

should be published; and only the most exceptional circumstances and the strongest reasons of public policy should be held to justify a departure from this rule.

Supervisory jurisdiction of the High Court.

VII.—(*a*) The jurisdiction of the High Court of Justice to compel Ministers and Ministerial Tribunals to keep within their powers and to "hear and determine according to law", i.e., to exercise their judicial and quasi-judicial powers in good faith and uninfluenced by extraneous and irrelevant considerations and fairly and not arbitrarily, should be vigilantly maintained.

(*b*) The existing procedure for invoking this jurisdiction is not satisfactory and should be replaced by procedure more modern, more simple, and less expensive.

Appeal on questions of law.

VIII.—(*a*) Any party aggrieved by the judicial decision of a Minister or Ministerial Tribunal should have an absolute right to appeal to the High Court of Justice on any question of law;

(*b*) A uniform and simple procedure should be established for all such appeals.

Simplifications of legal procedure.

IX. As a matter of procedure the legal distinction between an excess of jurisdiction for which *certiorari* is to-day the proper proceeding and an error of law for which an appeal is appropriate is unimportant for the purpose we have in view: the new form of procedure might well apply to both, and both might where convenient be included in the same proceeding. For simplicity we speak of both as an appeal.

Such a procedure should especially provide:—

(1) that the time within which an appeal may be brought should be strictly limited;
(2) that the appeal should be determined in a summary manner;
(3) that the appeal should be heard by a single judge; and
(4) that his decision should, as a general rule, be final.

Appeals on issues of fact.

X. There should, as a general rule, be no appeal to any Court of Law from the decision of a Minister or a Ministerial Tribunal on any issue of fact.

Parliament may, however, think in certain types of legislation (as it did in regard to War Pensions) that there are likely to be exceptional cases, where some appeals on facts should be allowed. In those cases the appeal should be to an Appeal Tribunal constituted by the Lord Chancellor and consisting of three persons, of whom one should be a barrister or solicitor of not less than seven years standing, who should be Chairman.

The procedure ought to be expeditious and governed by suitable rules of procedure to be made by the Lord Chancellor or the Rule Committee.

Administrative Law and the Crown Proceedings Bill.

XI. A system of administrative Law and administrative judges (i.e., analogous to the French system) should not be established; but we desire to record our opinion that, unless and until the Crown Proceedings Bill or a similar measure is passed into law, there will still remain a gap in the structure of the Constitution, where the supremacy of the Law does not prevail, even if all our recommendations are wholly carried out.

23. In conclusion we desire to express our thanks to our Secretaries. Mr. J. H. E. Woods, M.V.O., of the Treasury occupied that post during most of the time when we were collecting information and hearing evidence, and performed his duties with tact and success. In November, 1930, the Treasury found it necessary to withdraw him for other work in the Department, and his place was taken by Mr. W. R. Fraser, also of the Treasury, during the time of our deliberations and the drafting of our Report. His task has been laborious and difficult, and we are greatly indebted to him for the valuable services which he has rendered to us so ungrudgingly.

We have the honour to be,

My Lord,

Your Lordship's obedient servants,

LESLIE SCOTT (Chairman).
JOHN ANDERSON
BRIDGEMAN
E. LESLIE BURGIN
DONOUGHMORE
N. F. WARREN FISHER
ROGER GREGORY
W. S. HOLDSWORTH.
ELLIS HUME-WILLIAMS
HAROLD J. LASKI[267]
R. RICHARDS
CLAUD SCHUSTER
GAVIN T. SIMONDS
ELLEN WILKINSON[244]
JOHN J. WITHERS

W. R. FRASER (Secretary).
17th March, 1932.

[267] See notes on pages 135 to 138.
[244] See notes on pages 135 and 138.

ANNEX I.

Rules Publication Act, 1893 (56 & 57 Vict. c. 66).

An Act for the Publication of Statutory Rules. *A.D.* 1893.

[21st December, 1893.]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Notice of and representation respecting certain draft rules.

1.—(1) At least forty days before making any statutory rules to which this section applies, notice of the proposal to make the rules, and of the place where copies of the draft rules may be obtained, shall be published in the London Gazette.

(2) During those forty days any public body may obtain copies of such draft rules on payment of not exceeding threepence per folio, and any representations or suggestions made in writing by a public body interested to the authority proposing to make the rules shall be taken into consideration by that authority before finally settling the rules; and on the expiration of those forty days the rules may be made by the rule-making authority, either as originally drawn or as amended by such authority, and shall come into operation forthwith or at such time as may be prescribed in the rules.

(3) Any enactment which provides that any statutory rules to which this section applies shall not come into operation for a specified period after they are made is hereby repealed, but this repeal shall not affect section thirty-seven of the Interpretation Act, 1889. 52 & 53 *Vict.* c. 63.

(4) The statutory rules to which this section applies are those made in pursuance of any Act of Parliament which directs the statutory rules to be laid laid before Parliament, but do not include any statutory rules if the same or a draft thereof are required to be laid before Parliament for any period before the rules come into operation, nor do they include rules made by the Local Government Board for England or Ireland, the Board of Trade, or the Revenue Departments, or by or for the purposes of the Post Office; nor rules made by the Board of Agriculture under the Contagious Diseases (Animals) Act, 1878, and the Acts amending the same. 41 & 42 *Vict.* c. 74. 55 & 56 *Vict.* c. 47.

(5) The section shall not apply to Scotland.

(6) In the case of any rules which it is proposed shall extend to Ireland, publication in the Dublin Gazette of the notice required by this section shall be requisite in addition to, or, if they extend to Ireland only, in lieu of, publication in the London Gazette.

Provisional rules in certain cases.

2. Where a rule-making authority certifies that on account of urgency or any special reason any rule should come into immediate operation, it shall be lawful for such authority to make any such rules to come into operation forthwith as provisional rules, but such provisional rules shall only continue in force until rules have been made in accordance with the foregoing provisions of this Act.

Printing, numbering, and sale of statutory rules.

3.—(1) All statutory rules made after the thirty-first day of December next after the passing of this Act shall forthwith after they are made be sent to the Queen's printer of Acts of Parliament, and shall, in accordance with regulations made by the Treasury, with the concurrence of the Lord Chancellor and the Speaker of the House of Commons, be numbered, and (save as provided by the regulations) printed, and sold by him.

(2) Any statutory rules may, without prejudice to any other mode of citation, be cited by the number so given as above mentioned and the calendar year.

(3) Where any statutory rules are required by any Act to be published or notified in the London, Edinburgh, or Dublin Gazette, a notice in the

Gazette of the rules having been made, and of the place where copies of them can be purchased, shall be sufficient compliance with the said requirement.

(4) Regulations under this section may provide for the different treatment of statutory rules which are of the nature of public Acts, and of those which are of the nature of local and personal or private Acts; and may determine the classes of cases in which the exercise of a statutory power by any rule-making authority constitutes or does not constitute the making of a statutory rule within the meaning of this section, and may provide for the exemption from this section of any such classes.

(5) In the making of such regulations, each Government department concerned shall be consulted, and due regard had to the views of that department.

4. In this Act—

"Statutory rules" means rules, regulations, or byelaws made under any Act of Parliament which (*a*) relate to any court in the United Kingdom, or to the procedure, practice, costs, or fees therein, or to any fees or matters applying generally throughout England, Scotland, or Ireland; or (*b*) are made by Her Majesty in Council, the Judicial Committee, the Treasury, the Lord Chancellor of Great Britain, or the Lord Lieutenant or the Lord Chancellor of Ireland, or a Secretary of State, the Admiralty, the Board of Trade, the Local Government Board for England or Ireland, the Chief Secretary for Ireland, or any other Government Department.

"Rule-making authority" includes every authority authorised to make any statutory rules.

Short title. 5. This Act may be cited as the Rules Publication Act, 1893.

Treasury Regulations of 1894.

Regulations made by the Treasury with the concurrence of the Lord Chancellor and the Speaker of the House of Commons in pursuance of the Rules Publication Act, 1893.

56 & 57 Vict. c. 66. Whereas by the Rules Publication Act, 1893, hereinafter referred to as "the Act," regulations are authorised to be made by the Treasury, with the concurrence of the Lord Chancellor and the Speaker of the House of Commons, for such purposes in relation to Statutory Rules as are therein mentioned.

Now, therefore, We, the Lords Commissioners of Her Majesty's Treasury, in pursuance of the said Act, and of all other powers in that behalf, do hereby, with the concurrence of the Lord Chancellor and of the Speaker of the House of Commons, make the following regulations:—

1. Every exercise of a statutory power by a rule-making authority, which is of a legislative and not an executive character, shall be held to be a Statutory Rule within section three of the Act and these regulations.

2. An exercise of a statutory power which is confirmed only by a rule-making authority shall not be held to be a Statutory Rule within section three of the Act or these regulations.

3. Except as mentioned in Regulation 2, the volumes of Statutory Rules and Orders published by the Stationery Office in 1890, 1891 and 1892 shall form a practical guide for determining those exercises of statutory powers which should be treated as statutory rules within section three of the Act and these regulations.

4. A distinction shall be drawn between statutory rules which are general and those which are local and personal.

5. The distinction shall follow, unless in exceptional circumstances, that adopted between public Acts and local and personal Acts of Parliament.

6. All statutory rules when sent to the Queen's printer of Acts of Parliament, as required by the Act, shall be numbered consecutively as nearly as may be in the order in which they are received by the Queen's printer, and either with or without a second number for a particular class of rules.

7. The main series of numbers shall be a separate series for each calendar year, but statutory rules made in December in any year, and received by the Queen's printer of Acts of Parliament within 14 days after the end of that year, may be numbered with the statutory rules of that year and included in the annual volume of that year.

8. All statutory rules shall be printed and sold unless, in the case of rules not required to be published in any Gazette, the rule-making authority declare that it is unnecessary to print and sell them, and such declaration is not overruled on a reference under Regulation 15.

9. Statutory rules similar to public general Acts shall be printed in an annual volume, and that volume shall include a list of the statutory rules which are similar to local and personal Acts.

10. The rule-making authority, in sending any statutory rule to the Queen's printer of Acts of Parliament, shall state whether they consider the rule to be general or local and personal, and that statement shall be followed unless overruled on a reference under Regulation 15.

11. In the annual volume of statutory rules the general rules shall be published in a classified form, as in the volumes mentioned above in Regulation 3 which have been hitherto published.

12. Regulations 6 and 8 shall apply to temporary statutory rules, but if they have ceased to be in force at the time of the publication of the annual volume, or will so cease a short time afterwards, they shall not be included in that volume, unless the rule-making authority inform the Queen's printer of Acts of Parliament that they desire them to be so included.

13. The Treasury, with the concurrence of the Lord Chancellor and the Speaker of the House of Commons, may direct the exclusion from publication at length in any annual volume, of any rules which it seems to them unnecessary so to publish by reason of their annual or other periodical renewal; as, for instance, the militia regulations, the volunteer regulations, or the education code.

14. Any statutory rule or class of statutory rules which, on the application of the rule-making authority, may be determined by the Treasury, with the concurrence of the Lord Chancellor and the Speaker of the House of Commons, to be confidential, shall be exempted from section three of the Act and from these regulations.

15. Any question which arises under Regulation 8 as to the printing and sale of statutory rules, or under Regulation 10 as to statutory rules being general or local and personal, or which arises on the application or interpretation of these regulations, shall be referred to the Treasury, and determined by them with the concurrence of the Lord Chancellor and the Speaker of the House of Commons.

R. K. Causton,
W. McArthur,
(Commissioners of Her Majesty's Treasury).

I concur,
Herschell, C.

I concur,
Arthur W. Peel,
Speaker.

9th August, 1894.

TREASURY CIRCULAR OF 25TH NOVEMBER, 1921.

No. 43/21.
Treasury Chambers,
25th November, 1921.

STATUTORY RULES AND ORDERS: PROCEDURE.

SIR,

1. The Lords Commissioners of His Majesty's Treasury have had under consideration cases in which complaint has been made of delay in the supply to the public of copies of draft statutory rules and orders which become operative within a certain period after presentation to Parliament, or after publication of a notice in the Official Gazette. Inasmuch as such delay curtails the time within which interested parties have the right to submit objections to the orders it should clearly be reduced to the narrowest possible limits.

2. As regards draft orders which are issued to the public in printed form My Lords see no reason why copies should not be placed on sale within the period (normally 24 hours) required by the Stationery Office to print off copies from the corrected proof; all that is required to secure this being (1) that the order is not presented or notified in the Gazette until it is actually set up in proof and ready for press, and (2) that a press copy is sent to the Stationery Office simultaneously with presentation or notification. I am to request that if this arrangement is not already in operation in your Department steps may be taken to put it into force forthwith.

3. The foregoing does not apply to cases in which, on grounds of economy, the draft order is not issued in printed form but is duplicated in the Department by cheaper processes; but I am to request that similar arrangements may be adopted in these cases to secure that copies of the draft order are available to the public within 24 hours of presentation or notification. The Stationery Office should be informed in all such cases in order that they may be able to direct applicants where copies can be obtained, for all probable needs.

4. In this connection Their Lordships have had under consideration the unnecessary expenditure of public money which arises in certain cases from the reprinting in other forms of documents which have already been issued or will in due course be issued as statutory rules and orders, either in draft or final form; cases having been reported to Them of documents being set up in type and printed five times over. While it may not be possible in every case to restrict the issues of a document to the one (statutory rule and order) form, They think that this should be regarded as the normal course and departure from it should only be allowed on exceptional grounds. I am to request, therefore, that directions may be given that all documents which will eventually be issued as statutory rules and orders should be set up in the standard form at the outset and that as a general rule no variation be made from this form in subsequent issues except minor alterations of headings, &c. In particular such rules should not be printed in the official Gazettes, a notice in the terms of Section 3 (3) of the Rules Publication Act, 1893, being all that is required in such cases. These instructions should be regarded as extending also to documents laid before Parliament which have been or may eventually be issued as statutory rules and orders.

5. With a view to indicating more clearly the exact significance of documents of this character I am to request that the following detailed instructions may be observed:—

(a) Draft rules which have to be laid before Parliament should bear at the head a note showing that before they become statutory rules and

orders they require confirmation by the resolution of both Houses of Parliament or that they are subject to disallowance as the case may be.

(*b*) Rules which are not operative until a prescribed period has expired after presentation to Parliament should bear a similar note.

(*c*) Every statutory rule and order in its final form should show the date of its coming into operation and statutory rules superseding similar "Provisional" Rules should indicate either in the preamble or in a footnote the date on which the provisional rules came into force.

(*d*) "Provisional" rules should in all cases be superseded by rules in final form as early as possible.

(*e*) Every rule or order should contain a "Short Title" clause.

6. My Lords are aware that the foregoing instructions may not be entirely applicable in certain special cases and reference should be made on any doubtful points to the Official Editor of Statutory Rules and Orders (2, Harcourt Buildings, Temple, E.C.) who will, where necessary, communicate with this Department.

I am,

Your obedient Servant,

G. L. Barstow.

ANNEX II.

List of "Henry VIII" Clauses.

1. Local Government Act, 1888 (51 & 52 Vict., c. 41).

Part VI. Transitory Provisions.

General Provision as to First Elections.

Section 107.—[*Casual vacancies at first elections.*]

Section 108.—[*Power of Local Government Board to remedy defects.*]

(1) If from any cause there is no returning officer able to act in any county at the first election of a county council, or no register of electors properly made up, or no proper election takes place, or an election of an insufficient number of persons takes place, or any difficulty arises as respects the holding of the first election of county councillors, or as to the first meeting of a provisional council, the Local Government Board may by order appoint a returning officer or other officer, and do any matter or thing which appears to them necessary for the proper holding of the first election, and for the proper holding of the first meeting of the provisional council, and may, if it appears to them necessary, direct a new election to be held, and fix the dates requisite for such new election. Any such order may modify the provisions of this Act so far as may appear to the Board necessary for the proper holding of the first election and first meeting of the provisional council.

(3) The Local Government Board on the application of a county council or provisional council may within six months after the day fixed for the first election of the councillors of such council, from time to time, make such orders as appear to them necessary for bringing this Act into full operation as respects the council so applying, and such orders may modify any enactment in this or any other Act, whether general or local and personal, so far as may appear to the Board necessary for the said purpose.

[*Repealed* by Statute Law Revision Act, 1908 (8 Ed. 7, c. 49).]

2. Local Government Act, 1894 (56 & 57 Vict., c. 73).

Part V. Transitory Provisions.

Section 78.—[*First elections to parish councils.*]

Section 79.—[*First elections of guardians and district councils.*]

Section 80.—[*Power of county council to remove difficulties.*]

(1) If any difficulty arises with respect to the holding of the first parish meeting of a rural parish, or to the first election of parish or district councillors, or of guardians, or of members of the local board of Woolwich, or any vestry in the county of London, or of auditors in the county of London, or to the first meeting of a parish or district council, or board of guardians, or such local board or vestry as aforesaid, or if, from no election being held or an election being defective or otherwise, the first parish or district council, or board of guardians, or local board or vestry has not been properly constituted, or there are no auditors under the Metropolis Management Acts, 1855 to 1890, or an insufficient number, properly elected, the county council may by order make any appointment or do any thing which appears to them necessary or expedient for the proper holding of any such first meeting or election and properly constituting the parish or district council, board of guardians, local board, or vestry, or auditors, and may, if it appears to them necessary, direct the holding of a meeting or election and fix the dates for any such meeting or election, but a parish shall, notwithstanding any such failure to constitute the parish council be deemed to be a parish having a parish council within the meaning of this Act. Any such order may modify the provisions of this Act, and the enactments applied by or rules framed under this Act, and the enactments applied by or rules framed under this Act so far as may appear to the county council necessary or expedient for carrying the order into effect.

3. Metropolis Water Act, 1902 (2 Edw. 7, c. 41).

An Act for establishing a Water Board to manage the supply of water within London and certain adjoining districts, for transferring to the Water Board the undertakings of the Metropolitan Water Companies, and for other purposes connected therewith.

Section 40.—[*Onwards deals with Transitory Provisions.*]

Section 51.—[*Power of Local Government Board to remove difficulties.*]

(1) If any difficulty arises with respect to the establishment of the Water Board or to the appointment of the first members thereof or to the first meeting thereof, the Local Government Board may by order make any appointment or do anything which appears to them to be necessary or expedient for the proper establishment of the Water Board, and the proper holding of the first election and first meeting.

(2) Any such order may modify the provisions of this Act, so far as may appear to the Local Government Board necessary or expedient for carrying the order into effect.

[*Repealed* by Statute Law Revision Act, 1927 (17 & 18 Geo. V. c. 42).]

4. National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55).

An Act to provide for insurance against loss of health and for the prevention and cure of sickness and for insurance against unemployment, and for purposes incidental thereto.

Section 78.—[*Power to remove difficulties.*]

If any difficulty arises with respect to the constitution of Insurance Committees, or the advisory committee, or otherwise in bringing into operation this Part of this Act, the Insurance Commissioners, with the

consent of the Treasury, may by order make any appointment and do anything which appears to them necessary or expedient for the establishment of such committees or for bringing this Part of this Act into operation, and any such order may modify the provisions of this Act so far as may appear necessary or expedient for carrying the order into effect: Provided that the Insurance Commissioners shall not exercise the powers conferred by this Section after the 1st day of January, 1914.

[*Repealed* by National Health Insurance Act, 1924 (14 & 15 Geo. V. c. 38) S. 133, Sch. 7.]

5. Education (Scotland) Act, 1918 (8 & 9 Geo. 5. c. 48).

Election & proceedings of Education Authorities.

Section 22.—[*Qualification of electors.*]
Section 23.—[*Voting.*]
Section 24.—[*Dismissal of teachers.*]
Section 25.—[*Advisory councils in education areas.*]
Section 26.—[*Power of Department to aid in bringing Act into operation.*]

The Department, on the application of an education authority, may within 12 months after the first election of such authority, from time to time make such orders as appears to them necessary for bringing this Act into full operation as respects the authority so applying, and such order may modify any enactment in this or any other Act, whether general or local, so far as may appear to the Department necessary for the said purpose.

6. Unemployment Insurance Act, 1920 (10 & 11 Geo. 5. c. 30).

An Act to amend the law in respect of insurance against unemployment

Temporary and Transitory Provisions.

Section 45.—[*Power to remove difficulties.*]

If any difficulty arises with respect to the constitution of special or supplementary schemes or otherwise in any manner whatsoever in bringing this Act into operation, the Minister, with the consent of the Treasury, may by order do anything which appears to him necessary or expedient for the constitution of such schemes or for otherwise bringing this Act into operation, and any such order may modify the provisions of this Act so far as may appear necessary or expedient for carrying the order into effect:

Provided that the Minister shall not exercise the powers conferred by this Section after one year from the commencment of this Act.

[*Repealed* by Statute Law Revision Act, 1927 (17 and 18 Geo. V. c. 42).]

7. Widows', Orphans', & Old Age Contributory Pensions Act, 1925, (15 & 16 Geo. 5. c. 70.)

An Act to make provision for pensions for widows, orphans, and persons between the ages of 65 and 70, and for the payment of contributions in respect thereof; and to amend the enactments relating to health and unemployment insurance and old age pensions.

[*Sections* 28 *to* 36 *deal with Administrative Provisions.*]
Section 36.—[*Power to remove difficulties.*]

If in any respect any difficulty arises in bringing into operation this Act, the Minister, with the consent of the Treasury, may by order do anything which appears to be necessary or expedient for bringing this Act into

operation, and any such order may modify the provisions of this Act so far as may appear necessary or expedient for carrying the order into effect.

Provided that the powers conferred by this Section shall not be exercised after the 31st December, 1926.

8. The Rating and Valuation Act, 1925 (15 & 16 Geo. 5. c. 90).

An Act to simplify and amend the law with respect to the making and collection of rates by the consolidation of rates and otherwise, to promote uniformity in the valuation of property for the purpose of rates, to amend the law with respect to the valuation of machinery and certain other classes of properties, and for other purposes incidental to or connected with the matters aforesaid.

Sections 57-70.—[*Miscellaneous Provisions.*]

Section 67.—[*Power to remove difficulties.*]

(1) If any difficulty arises in connection with the application of this Act to any exceptional area, or the preparation of the first valuation list for any area, or otherwise in bringing into operation any of the provisions of this Act, the Minister may by order remove the difficulty or constitute any assessment committee, or declare any assessment committee to be duly constituted, or make any appointment, or do any other thing, which appears to him necessary or expedient for securing the due preparation of the list or for bringing the said provisions into operation, and any such order may modify the provisions of this Act so far as may appear to the Minister necessary or expedient for carrying the order into effect:

Provided that the Minister shall not exercise the powers conferred by this Section after the 31st March, 1929.

(2) Every order made under this section shall be laid before both Houses of Parliament forthwith, and if any Address is presented to His Majesty by either House of Parliament within the next subsequent 28 days on which that House has sat after any such order is laid before it praying that the order may be annulled it shall thenceforth be void, but without prejudice to the validity of anything previously done thereunder or the making of a new order.

[As to the powers of the Minister of Health to remove difficulties, see *R.* v. *Minister of Health*, Ex. p. Wortley Rural District Council (1927) 2 K.B. 229.]

9. Local Government Act, 1929 (19 & 20 Geo. 5. c. 17).

An Act to amend the law relating to the administration of poor relief, registration of births, deaths and marriages, highways, town planning and local government; to extend the application of the Rating and Valuation (Apportionment) Act, 1928, to hereditaments in which no persons are employed; to grant complete or partial relief from rates in the case of hereditaments to which that Act applies; to discontinue certain grants from the Exchequer and provide other grants in lieu thereof; and for purposes consequential on the matters aforesaid.

Part VIII. General provisions.

Section 130.—[*Power to remove difficulties.*]

(1) If any difficulty arises in connection with the application of this Act to any exceptional area, or in bringing into operation any of the provisions of this Act, the Minister may make such order for removing the difficulty as he may judge to be necessary for that purpose, and any

such order may modify the provisions of this Act so far as may appear to the Minister necessary for carrying the order into effect.

Provided that the Minister shall not exercise the powers conferred by this section after the 31st December, 1930.

(2) Every order made under this section shall come into operation upon the date specified therein in that behalf, but shall be laid before Parliament as soon as may be after it is made and shall cease to have effect upon the expiration of a period of three months from the date upon which it came into operation, unless at some time before the expiration of that period it has been approved by a resolution passed by each House of Parliament:

Provided that, in reckoning any such period of three months as aforesaid, no account shall be taken of any time during which Parliament is dissolved or prorogued, or during which both Houses are adjourned for more than four days.

[As to whether the Order of the Ministry of Health may be removed into the High Court by a writ of certiorari, see R. v. Hastings Board of Health (1865) 6 B. and S. 401; R. v. Woodhouse, 1906, 2 K.B. 501, and R. v. Minister of Health, ex Davis, 1929, 1 K.B. 619, and cases cited in the E. and E. Digest, Vol. 16, pp. 412 et seq.]

ANNEX III.

THE SAFEGUARDING OF INDUSTRIES (EXEMPTION) NO. 5 ORDER, 1931, DATED NOVEMBER 10, 1931, MADE BY THE TREASURY UNDER SECTION 10 OF THE FINANCE ACT, 1926 (16 & 17 GEO. 5. c. 22).

[S.R. & O., 1931, No. 954.]

Whereas it is provided by sub-section (5) of Section 10 of the Finance Act, 1926 (16 & 17 Geo. 5. c. 22) that the Treasury may by Order exempt from the duty imposed by Section 1 of the Safeguarding of Industries Act, 1921 (11 & 12 Geo. 5. c. 47) as amended by the Finance Act, 1926, for such period as may be specified in the Order, any article in respect of which the Board of Trade are satisfied on a representation made by a consumer of that article that the article is not made in any part of His Majesty's Dominions in quantities which are substantial having regard to the consumption of that article for the time being in the United Kingdom and that there is no reasonable probability that the article will within a reasonable period be made in His Majesty's Dominions in such substantial quantities:

And whereas, by the Safeguarding of Industries (Exemption) No. 2 Order, 1930,[a] the Safeguarding of Industries (Exemption) No. 3 Order, 1930,[b] the Safeguarding of Industries (Exemption) No. 1 Order, 1931,[c] the Safeguarding of Industries (Exemption) No. 2 Order, 1931,[d] and the Safeguarding of Industries (Exemption) No. 3 Order, 1931,[e] made by the Treasury the articles specified in the First Schedule to this Order were inter alia exempted from the duty imposed by Section 1 of the Safeguarding of Industries Act, 1921, as amended by the Finance Act, 1926, for a period ending on the 31st December, 1931.

And whereas the Board of Trade are satisfied on representations by consumers of the articles specified in the First and Second Schedules to

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[a] S.R. & O. 1930 (No. 758) p. 1689.
[b] S.R. & O. 1930 (No. 929) p. 1690.
[c] S.R. & O. 1931, No. 50.
[d] S.R. & O. 1931, No. 335.
[e] S.R.&O. 1931. No. 541.

this Order that these articles are not made in any part of His Majesty's Dominions in quantities which are substantial having regard to the consumption of these articles for the time being in the United Kingdom and that there is no reasonable probability that these articles will, within a reasonable period be made in His Majesty's Dominions in such substantial quantities:

Now therefore We, the Lords Commissioners of His Majesty's Treasury, in pursuance of the powers conferred on Us by the said Section 10 of the Finance Act, 1926, and of all other powers enabling Us in that behalf, hereby order as follows:—

1. This Order may be cited as the Safeguarding of Industries (Exemption) No. 5 Order, 1931.

2. The articles mentioned in the First Schedule to this Order shall continue to be exempt from the duty imposed by Section 1 of the Safeguarding of Industries Act, 1921, as amended by the Finance Act, 1926, from the expiration of the period prescribed by the five above mentioned Orders until the 31st day of December, 1932, inclusive.

3. Such of the articles mentioned in the Second Schedule to this Order as are not entered under the Customs Acts before the 17th day of November, 1931, or which have not been removed from a bonded warehouse before that date, shall also be exempt from the said duty until the 31st day of December, 1932, inclusive.

Dated this 10th day of November, 1931.

GEORGE PENNY,
D. EUAN WALLACE,
Two of the Lords Commissioners of
His Majesty's Treasury.

FIRST SCHEDULE.

Acid adipinic; acid isobutyl allyl barbituric; acid oxalic; acid propionic; amidopyrin (pyramidon; dimethylamidoantipyrine); ammonium perchlorate; barbitone (veronal; malonal; malourea; acid diethyl barbituric; diethylmalonylurea; hypnogen; deba); bromural (dormigene); butyl methyl adipate; calcium gluconate (calcium glyconate); celtium oxide; chinoline (quinoline); chinosol; cocaine, crude; dial (acid diallyl barbituric); dicyandiamide; didial (ethyl morphine diallyl barbiturate); diphenyl; diphenyl oxide; dysprosium oxide; elbon (cinnamoyl para oxyphenyl urea); erbium oxide; ethylene bromide; eukodal; europium oxide; furfurol; gadolinium oxide; germanium oxide; glycol ethers; guaiacol carbonate (duotal); holmium oxide; hydroquinone; integrators (planimeter type; R. lead acetate; lead tetraethyl; lipoiodin; lutecium oxide; mercury vapour rectifiers having mercury cathodes; metaldehyde; methyl cyclohexanol methyl adipate; methyl sulphonal (diethylsulphonemethylethylmethane; trional); methylene chloride; neodymium oxide; nickel hydroxide; oxymethyl paraoxyphenyl benzylamine methyl sulphate; papaverine; phenacetin (acetparaphenetidine); phenazone (antipyrine; phenyl dimethylpyrazolone; analgesin anodynine; dimethyl oxychinizin); phenetidine, para-; phytin; piperazine (diethylenediamine; dispermin); planimeters; R. potassium chlorate; potassium ethylxanthogenate (potassium xanthogenate); potassium guaiacol sulphonate (thiocol); R. potassium hydroxide (R. potassium caustic; R. potassium hydrate); R. potassium permanganate; praseodymium oxide; pyramidon-veronal; quinine ethyl-carbonate; radium compounds; resorcine (resorcinol); salol (phenyl salicylate); samarium

oxide; scandium compounds; sodium ethyl methyl butyl barbiturate; strontium carbonate; strontium nitrate; styracol (guaiacol cinnamate); sulphonal; synthalin; terbium oxide, thulium oxide; urea (carbamide); vanadium-silica compounds specially prepared for use as catalysts for sulphuric acid manufacture; ytterbium oxide, yttrium oxide.

SECOND SCHEDULE.

Dimethyl sulphate.

Ethyl abietate.

Photogravure screens (both rulings on one plate) exceeding 40 inches in length.

ANNEX IV.

MINISTERIAL TRIBUNALS.

1. Contributory Pensions (England and Wales).

The only Tribunal for hearing appeals against decisions of the Minister of Health is the panel of Referees set up under Section 29 of the Widows', Orphans' and Old Age Contributory Pensions Act, 1925.[1] That Section provides that the Referees are to be selected from a panel appointed under regulations to be made by the National Health Insurance Joint Committee (a body constituted under Section 88 of the National Health Insurance Act, 1924,[2] and consisting of the Minister of Health, the Secretary for Scotland, the Minister of Labour for Northern Ireland, and a person appointed by the Minister of Health and having special knowledge and experience of national health insurance in Wales). The regulations made under Sections 29 (2) and 30 (1) (*b*) of the Act of 1925 are S.R. and O. 1928, No. 460. The appointment of the panel is dealt with in Article 3. The decision of the Referee or Referees who deal with the case is final and conclusive, but under Section 19 of the Arbitration Act, 1889,[3] which is applied by the first schedule to the regulations, the Referee or Referees can be required to state a case for the opinion of the Court on any question of law arising in the course of the reference.

There are at present 16 Referees working under these regulations, of whom two are usually described as the Senior Referees and deal with cases involving important points of principle. The regulations themselves make no provision for Senior Referees as such, and the Senior Referees do not act as a court of appeal from the Junior, but in order to preserve some measure of uniformity it has been found of great value to have two Referees whose opinions are recognised by the remainder as carrying special weight.

As already stated, the appointments lie in the hands of the National Health Insurance Joint Committee, but when the system was set up, it was felt that the selection of suitable persons was a matter of such importance that the co-operation of the Attorney-General was invited, and it has from the outset been the invariable practice that Referees are appointed only on the nomination of the Attorney-General for the time being. The regulations do not provide for any particular term of office. Up to the present the work involved in deciding the claims of widows and others who became entitled at the inception either of the Act of 1925[1] or of that of 1929[4] has been sufficient to require some 12 to 16 Referees, and they have been appointed on a yearly basis since it has been uncertain what number of permanent Referees would be required when the initial work of bringing

[1] 15 & 16 Geo. 5, c. 70.
[2] 14 & 15 Geo. 5, c. 38.
[3] 52 & 53 Vict., c. 49.
[4] 20 & 21 Geo. 5, c. 10.

the Acts into operation was over. One or two Referees have resigned on receiving other appointments, but no question of dispensing with the services of a Referee has as yet arisen.

The method of appeal to the Referees is the only procedure by which a claimant can question the decision of the Minister.

2. Contributory Pensions (Scotland).

Section 29 (2) of the Widows', Orphans' and Old Age Contributory Pensions Act, 1925, provides that if any person is dissatisfied with the award or decision of the Department of Health in respect of any pension the question shall, on application being made, be referred to one or more referees selected in accordance with the regulations made by the National Health Insurance Joint Committee from a panel of Referees appointed in accordance with the regulations. The regulations which have been made under this sub-section are the Contributory Pensions Reference Regulations (Scotland), 1925 (S.R. & O. 1925, No. 1406, S. 101).

Article 3 of the regulations provides that for the purpose of dealing with references under the above mentioned sub-section the Joint Committee shall appoint a panel of referees, being advocates or solicitors. No member or officer of the Department shall be appointed a member of the panel. Appointments are made for such period as the Joint Committee may think fit and any person who has ceased to be a member of the panel of Referees is eligible for re-appointment.

The panel in Scotland consists of three persons—all of whom are advocates and two are sheriffs.

The above mentioned sub-section provided that the decision of the Referees should be final and conclusive but by Section 26 of the Widows', Orphans' and Old Age Contributory Pensions Act, 1929,[4] which came into operation on 2nd January, 1930, it is provided that the Referees may, on the application of any party to the reference, at any stage in the proceedings and shall, if so directed by either division of the Court of Session, state a case on any question of law arising in the reference for the opinion of either division of the Court of Session.

3. The Rents Tribunal in connection with Assisted Housing Schemes under the Housing, Town Planning etc. (Scotland) Act, 1919.[5]

By Article VII (4) (*a*) of the Local Authorities (Assisted Housing Schemes) Regulations (Scotland) 1919, made under Section 5 of the Act, it is provided that in the event of any difference of opinion arising between the Department of Health and a Local Authority with regard to the sufficiency of the rents charged or proposed to be charged or as to the failure of the Local Authority to secure due economy in the carrying out or administration of their housing scheme, the question at issue shall be referred for decision to a Tribunal appointed as provided for in the Regulations.

In accordance with the regulations as amended by later regulations dated 4th August, 1921, the Tribunal consists of two members appointed by the Department, one member nominated by the Convention of Royal Burghs, and one member nominated by the Association of County Councils in Scotland and of a Chairman to be appointed by the four members so nominated. If at a meeting of the Tribunal the four nominated members are not present the Tribunal are entitled to act through a Committee consisting of the Chairman and two members, one of whom shall be a member nominated by the Department and the other shall be a member nominated

[4] 20 & 21 Geo. 5, c. 10.
[5] 19 & 20 Geo. 5. c. 60.

either by the Convention of Royal Burghs or by the aforesaid Association and any decision of such Committee shall be deemed to be a decision by the Tribunal.

The members of the Tribunal continue in office until they resign or die. Recourse to the Tribunal is the only method of appeal and the decision of the Tribunal is final and conclusive.

4. Income Tax: Non-Residents.

Under Rule 9 (2) of the General Rules applicable to all Schedules of the Income Tax Act, 1918,[6] in connection with the assessment of the profits of non-residents trading here through resident agents, it is provided that in certain circumstances, where the charge is based on a percentage of the turnover, "if either the resident person or the non-resident person is dissatisfied with the percentage determined in the first instance or by the General or Special Commissioners on objection or appeal, he may within four months of that determination require the Commissioners to refer the question of the percentage to a Referee or a Board of Referees to be appointed for the purpose by the Treasury, and the decision of the Referee or Board shall be final and conclusive."

This provision has never been brought into operation by taxpayers and no appointments have been made by the Treasury of any Referee or Board of Referees.

5. The Adjudication Machinery set up under the Unemployment Insurance Acts, 1920-1930.

(i) Section 8 of the Unemployment Insurance Act, 1930,[7] provides that claims to benefit and all questions arising in connection with such claims shall be determined by specially appointed statutory authorities: namely, the Insurance Officer, Courts of Referees and the Umpire. The Minister of Labour has no power to admit or reject any claim. Further the decisions of the Umpire are final, there being no power of appeal or reference from him to the Courts of Law.

(ii) *Insurance Officers.*

Insurance Officers are appointed by the Minister under Section 12 (1) of the Unemployment Insurance Act, 1920.[8] They are, for the most part, members of the established staff of the Ministry and are of various grades of pay.

There is at least one Insurance Officer at each of the 1,100 Local Offices of the Department, of which 400 are Employment Exchanges and 700 are Branch Employment Offices: there are two or more Insurance Officers at each of the seven Divisional Offices of the Ministry of Labour, and there is a staff of twenty-two Insurance Officers at Headquarters.

The powers of Insurance Officers are set out in Section 8 of the Unemployment Insurance Act, 1930.[7] Under that section, all claims to benefit and all questions arising in connection with such claims must be submitted forthwith for examination to an Insurance Officer, who may allow benefit if he is of opinion that it ought to be allowed, but (save for the class of case mentioned in the next paragraph) must refer the matter to the Court of Referees for decision, if he does not allow the claim.

The exception referred to is that of a question whether the claimant lost employment owing to a stoppage of work due to a trade dispute. In such a case, the Insurance Officer, instead of referring the matter to the Court

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[6] 8 & 9 Geo. 5. c. 40.
[7] 20 & 21 Geo. 5. c. 16.
[8] 10 & 11 Geo. 5. c. 30.

of Referees, may disallow the claim himself. In such cases, the claimant has the right of appeal, within 21 days, (or such further time as may be allowed for special reasons) to the Court of Referees.

The Insurance Officer has also a right of appeal to the Umpire against the decision of a Court of Referees in all cases.

(iii) *Courts of Referees.*

Courts of Referees have been set up for about 300 districts in Great Britain. They are established under Section 13 of the Unemployment Insurance Act, 1920,[s] which provides that a Court shall consist of one or more members chosen to represent employers, with an equal number of members chosen to represent insured contributors, and a Chairman appointed by the Minister.

The constitution and procedure of the Court are further regulated by the Courts of Referees Regulations, 1930. Under these regulations the Court consists of one employers' representative and one representative of insured contributors, in addition to the Chairman, but it is also provided (in accordance with sub-section 2 of Section 13), that, with the consent of the claimant but not otherwise, the Court may proceed in the absence of either or both of the representative members (but not of the chairman).

The Chairmen are appointed by the Minister after consideration of suitable candidates and after consultation with the Attorney General in respect of the Metropolitan District, County Court Judges in respect of other parts of England, and the Secretary of State for Scotland in respect of Scotland. The National Confederation of Employers' Organisations and the General Council of the Trades Union Congress are notified of any vacancy and given an opportunity of submitting recommendations. The large majority of the Chairmen are drawn from the legal profession. The Chairmen are not in the ordinary sense members of the staff of the Ministry. Their appointments are in all cases limited to one year, subject to one month's notice on either side, but are in general renewed from year to year. Their remuneration takes the form of a fee for each sitting, with travelling and subsistence expenses if incurred.

The members representing employers and insured contributors respectively are appointed by the Minister. They hold office for three years and are selected from local persons in each district generally on the recommendation of the Local Employment Committee for the district concerned. Representative members receive travelling and subsistence allowances and allowances for loss of wages, but no fees or other remunerative payments.

A representative of employers must be either an employer of insured contributors or a nominee of an association of such employers or a member or officer of a corporate body employing insured contributors. An insured contributors' representative must be either himself an insured contributor or a nominee of an association of insured contributors. The panels of members include women as well as men and it is arranged as far as possible that the representative members of the Court shall be women when women's cases are being considered.

Persons are disqualified from sitting if they are interested in any way in a case under consideration by the Court, or if they are claiming unemployment benefit.

Particulars of any case as it is to be submitted to the Court are forwarded to the claimant who has the right to attend the hearing of his case and to bring a representative (other than a barrister or a solicitor). The decision of the Court is communicated in writing to the claimant, and he is also furnished with the report of the proceedings of the Court as soon as possible after the hearing.

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[s] 10 & 11 Geo. 5, c. 30.

Local Referees.

In order to provide for outlying places where the number of cases arising is too small to justify sittings of Courts of Referees and where the claimants would find it inconvenient or impossible to reach the centre where the sittings take place, the Court of Referees Regulations authorise the Insurance Officer to refer any case to Local Referees consisting of one representative of employers and one representative of insured contributors drawn from the panels resident in the neighbourhood in which the claimant resides. The main function of the Local Referees is to furnish findings of fact upon which the Insurance Officer or the Court of Referees may base a decision. The Referees report to the Insurance Officer who decides either to allow the claim on their report or to refer it to the Court of Referees.

(iv) *The Umpire.*

Section 12 (1) and (3) of the Unemployment Insurance Act, 1920,[6] provides for the appointment by the Crown of an Umpire and one or more Deputy Umpires, and for payment of their remuneration out of monies provided by Parliament. There are at present one Umpire and several Deputy Umpires.

Section 8 (5) (6) of the Unemployment Insurance Act, 1930,[7] provides for appeals to the Umpire in certain circumstances and that the decision of the Umpire on any appeal shall be final. The circumstances in which an appeal may be made to the Umpire are as follows:—

(*a*) at the instance of the Insurance Officer in any case;

(*b*) at the instance of an association of employed persons of which the claimant is a member in any case;

(*c*) at the instance of the claimant if the decision of the Court of Referees is not unanimous or otherwise with the leave of the Court. The Court is directed to have regard in deciding whether leave to appeal should be granted to the importance of the principle involved in the case or any other special circumstances.

Appeals to the Umpire must be brought within six months after the date of the Court's decision or within such longer period as the Umpire may, for special reasons, allow.

6. Pensions Appeals Tribunals.

These Tribunals were constituted under the War Pensions Acts, 1919-1921,[8] to hear appeals from decisions of the Minister of Pensions (*a*) where the Minister has rejected a claim as not attributable to or aggravated by war service ("Entitlement Tribunals") or (*b*) where a claimant is dissatisfied with the final award made in his case by the Minister ("Assessment Tribunals").

In England the members of the Tribunals are appointed by the Lord Chancellor and consist of:—

Entitlement Tribunals:

Legal Representative (Barrister or solicitor of at least seven years' standing),
Service Member (Disabled officer or soldier),
Medical Practitioner.

Assessment Tribunals:

Two Medical Practitioners,
One Service Member.

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[8] 9 & 10 Geo. 5, c. 53; 10 & 11 Geo. 5, c. 23; 11 & 12 Geo. 5, c. 49.

The work has diminished very considerably and there are now only three tribunals in England. There is no alternative method of appeal and the decision is final.

There are separate tribunals for Scotland, Northern Ireland, and the Irish Free State, all now on a sessional basis. Appointments are made for Scotland by the Lord President of the Court of Session and for Ireland by the Secretary of State.

7. Gas Administration.

It is provided by Section 4 of the Gas Regulation Act, 1920,[10] that the Board of Trade shall appoint three persons to act as Gas Referees, and also a competent and impartial person to be Chief Gas Examiner. These officers hold office for such time and on such conditions as the Board of Trade direct, and by Section 7 their salaries, remuneration, pensions and gratuities, shall be such as may be fixed by the Board with the consent of the Treasury.

It is also provided by Section 4 that a Local Authority (unless they are the undertakers) or a County Council with the consent of the Local Authority, may appoint a competent and impartial person to be a Gas Examiner to test gas and the pressure subject to the prescription of the Gas Referees. Quarter Sessions may on the application of not less than five consumers, appoint an examiner where none is appointed by the Local Authority.

By Section 5 it is provided that the Gas Referees shall prescribe:—

(*a*) the places and times at which and the apparatus and method by which tests, whether continuous or intermittent, shall be made to ascertain whether any undertakers with respect to whom an order has been made under this Act are supplying gas in accordance with their obligations; and

(*b*) the method by which any such apparatus shall be verified; and

(*c*) the time and form of the reports to be made by the Gas Examiner to the Gas Referees and the Local Authority or Quarter Sessions by whom he is appointed, and to the undertakers, and the means by which the results of the tests shall be made available to the public.

It is provided by Section 6 that if the undertakers or the Local Authority think themselves aggrieved by any prescription of the Gas Referees, they may, within one month from the taking of such prescription appeal to the Chief Gas Examiner, who, after hearing the parties and any other body or person appearing to him to be interested, may confirm, with or without amendment, or annul the prescription, and the decision of the Chief Gas Examiner shall be final and conclusive.

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[10] 10 & 11 Geo. 5, c. 28.

ANNEX V.

NOTE BY PROFESSOR LASKI[1] ON THE JUDICIAL INTERPRETATION OF STATUTES.

I wholly concur in the conclusion of the Committee that it is undesirable to transfer the interpretation of statutes which define and control the administrative process (whether local or central) to special Courts. No gain which might result therefrom in flexibility of construction seems to me to counterbalance the value of the independent assessment of statutory intention which is now afforded by the ordinary Courts. The historic principle of the rule of law cannot, I think, be better protected than by making the ordinary judges the men who decide the legality of executive action.

But this is not to say that the methods of interpretation now used by the Courts are satisfactory. The report assumes that the difficulties felt are merely a matter of the inherent problems of drafting; and that, consequently, an improvement in the technique of draftsmanship will, of itself, enable the judges fully to express the intention of Parliament in their decisions.

While I concur with all that is said in the report about the need, especially in view of the admirable work it now performs, to strengthen the Parliamentary Counsel's office, I cannot accept the view that this, of itself, will produce a satisfactory system of statutory interpretation. The canons of the historic method now operative seem to me defective in a number of particulars; (1) they exaggerate the degree to which the intention of Parliament may be discovered from the words of a statute; (2) they under-estimate the degree to which the personality of the judge, what Mr. Justice Holmes has called his "inarticulate major premiss",[2] plays a part in determining the intention he attributes to Parliament; (3) they exaggerate both the certainty and the universality of the Common Law as a body of principles applicable, in the absence of statute, to all possible cases; (4) they minimise the possibilitity that the judge can, in his work of interpretation, fully operate the principle of *Heydon's case*[3] and consider the evil the statute was intended to remedy so that their construction may suppress the mischief and advance the remedy. They thus make the task of considering the relationship of statutes, especially in the realm of great social experiments, to the social welfare they are intended to promote one in which the end involved may easily become unduly narrowed either by reason of the unconscious assumptions of the judge, or because he is observing principles of interpretation devised to suit interests we are no longer concerned to protect in the same degree as formerly.

I will not burden this note with an excess of illustration. But anyone who considers the history of the statutes dealing with workmen's compensation would, I conceive, find it difficult to avoid the conclusion that some of the judges, at least, misled by their no doubt unconscious dislike of limitations upon freedom of contract imposed by these statutes, minimised much of their force by interpreting away their safeguards. It is, I think, also clear that in the history of trade union legislation principles of the Common Law, previously unknown, were invoked to narrow their purposes in a way which defeated the clear intention of those statutes; the Taff Vale case[4], and the contrast between the decision in the Mogul Steamship Case[5], on the one hand, and the line of judgments beginning with *Lumley* v. *Gye*[6] and

[1] Miss Wilkinson concurs in this note.
[2] Lochner v. New York, 198 U.S. 45, 76.
[3] (1584) 3 Co., Rep. 8.
[4] (1901) A.C. 426.
[5] (1892) A.C. 25.
[6] 2 E. & B. 224.

ending with *Quinn v. Leathem*[7], will sufficiently illustrate this thesis. When the Divisional Court held that attendance by school children at performances of Shakespeare's plays could not be regarded as an object of "educational" expenditure[8]; or when it is held by the House of Lords that a power in Local Authorities to pay "such salaries and wages as they . . . . . may think fit" means, in fact, such salaries and wages as the House of Lords may consider "reasonable";[9] it seems to me clear that there is a discretion beyond the mere compulsion of words in the judicial interpretation of statutes. And this discretion, as I think, enables the judge to substitute his private notions of legislative intention for those which the authors of the statute sought to fulfil.

In the absence of any guidance beyond the words of the statute itself, I venture, therefore, to doubt whether the judge has in fact a sufficient clue to the policy which is behind the legislation. He must, as *Heydon's case* sought to insist, take proper account of the end the statute was intended to serve. Our legal tradition assumes that training in the law alone will enable him to do this; a proposition I have difficulty in accepting. But I agree that the strength of that tradition would make it difficult to persuade the judiciary to embark upon the examination of material for the elucidation of that end to which neither judicial nor legislative authority attaches. Indeed the result of such an adventure might be to widen, rather than to narrow, the present discretion of the judge.

But it seems to me that there is a middle way. If statutes do not plainly avow their intention by their words, the desirable thing is, I submit, to attach to them an authoritative explanation of intention. This could be done in one of two ways: (1) as was so often the case in the Tudor period, by way of preamble to the statute itself. There would here be set out, as clearly as draftsmanship will permit, the end the statute has in view; or (2) by way of memorandum in explanation of the statute. It is well known that it has become increasingly the practice in modern legislation to issue to members of Parliament a memorandum in explanation of any complex legislation that is laid before them; a good example is the explanatory memorandum which accompanies the Children's Bill now under discussion by Parliament. The value of these memoranda is great; and they would, I suggest, be of real assistance to the judge in discovering the purpose the statute is intended to serve.

Objections to this course are, I understand, urged on several grounds. It is said that a preamble is, strictly, without legislative force, since it is merely a guide to the meaning of a statute. This is, of course, true; but it is at least an authoritative guide which, in the hands of a competent draftsman, could hardly fail to be an instrument of clarification, a good mean, as Coke put it,[10] for collecting the intent, and showing the mischiefs which the makers of the Act intended to remedy. It is argued, further, that the memorandum of explanation sets forth the purposes of the Bill as it leaves the Department in which it originated. The Bill may be changed in Committee or on Report; and since it is, in any case, no part of the statute, by our rules of interpretation, it would have no standing before the Courts. But on the first point I confess that it does not seem to me beyond the wit of man, and certainly not beyond the wisdom of a Department, to issue a revised memorandum after a Bill has gone through all its stages, in which account is taken of the changes which discussion has made. Upon the second, it seems to me that authority could be conferred

[7] (1901) A.C. 495.

[8] *R.* v. *Lyon*, 38 T.L.R. 62.

[9] *R.* v. *Roberts*, 1925, A.C. 578. I venture to refer to my Studies in Law and Politics (Chap. IX) for a full discussion of this case.

[10] 4 Inst. 330.

upon the judges to utilise the memorandum in their work of interpretation. I am not, be it noted, asking that they should be so bound by it that they have no alternative but to accept its terms; I am suggesting only that it will be found an invaluable guide for the judge in his task of discovering what a statute is really intended to mean. I suggest, further, that the history of statutory interpretation, especially since the nineteenth century, indicates plainly the need for such a guide if the rule of law is to be maintained in its historic amplitude.

I cannot put my point better than by quoting the words of one of the most eminent of English jurists, Sir Frederick Pollock. "There is a whole science of interpretation", he writes[11], "better known to judges and parliamentary draftsmen than to most members of the legislature itself. Some of its rules cannot well be accounted for except on the theory that Parliament generally changes the law for the worse, and that the business of the judges is to keep the mischief of its interference within the narrowest possible bounds." Legislation construed by the historic canons of analysis which our Courts adopt is too often so interpreted as to defeat the real intention of the legislator. I have illustrated this from a narrow field; it would be possible to do so from the whole field of the law. I suggest that the method of interpretation should be less analytical and more functional in character; it should seek to discover the effect of the legislative precept in action so as to give full weight to the social value it is intended to secure. The enlargement of the sources of interpretation I have ventured to indicate as desirable would, I think, contribute in an important way to this objective. They would enable statutes to be viewed not in isolation, not as abstract principles separated from the social conditions which provide their real motive-force, but in the framework of the circumstances to which they owe their origin. To view them in this way would, I believe, greatly add to the respect in which the Courts are held. Thereby it would give a new vigour to the creative power of what the rule of law implies.

HAROLD J. LASKI.
17th March, 1932.

ANNEX VI.

NOTE BY MISS ELLEN WILKINSON ON DELEGATED LEGISLATION, WITH FURTHER NOTE BY PROFESSOR LASKI.

While agreeing generally with this report I would like to add a note regarding the tone of certain passages which rather give the impression that the delegating of legislation is a necessary evil, inevitable in the present state of pressure on parliamentary time, but nevertheless a tendency to be watched with misgiving and carefully safeguarded.

I feel that in the conditions of the modern state, which not only has to undertake immense new social services, but which before long may be responsible for the greater part of the industrial and commercial activities of the country, the practice of Parliament delegating legislation and the power to make regulations, instead of being grudgingly conceded, ought to be widely extended, and new ways devised to facilitate the process.

The danger of the present method of examining each piece of legislation in detail, whether by the whole House of Commons, or by an unwieldy Committee which proceeds on the cumbrous Commons method, is

[11] Essays in Jurisprudence and Ethics, p. 85.

not that Parliament has no time to do its work, but that so much of its time is wasted.

While the farce persists that each Member has the right to scrutinise the details of Bills, many of which he cannot even pretend to know anything about, members of Parliament are humiliated by being kept in the House as mere voting machines, while the experience and advice they could contribute as to the general plan to be pursued by the Government of the day is seldom utilised.

Parliament can only deal really effectively with the principles and general plan of proposed legislation. The details should be left to the experts. This would make it possible for the House of Commons to discuss thoroughly and intelligently the broad outlines and enable a more real control over the Executive to be exercised than can possibly be the case when Parliament becomes an obstacle race, the sole duty of the Opposition being to provide the hedges and ditches on the course.

In my view it would be better if the Committee stage of a Bill, as we now understand it, did not come before Parliament at all. If a second reading debate settled the general principles and approved the plan, the draft could be handed over to the experts to settle the details within that framework, the House giving a further general consideration of it, to see that this had been done.

Such a procedure would cut out mere obstruction, and ensure that the Bill really expressed what Parliament intended should be enacted. It would prevent amateur amendments being rushed into a Bill, perhaps by one of these emotional waves to which the House of Commons is notoriously subject, and which often cause lengthy and bitter litigation when the Act is put into operation.

Where Parliamentary scrutiny of detail is necessary this could be better done by a small committee representative of party strength in the Commons, sitting with the Departmental experts and discussing details fully with them. At present, the Committee is frequently a farce, because the experts have to sit silent, merely advising the Minister on points. The discussion by the Members may not have anything much to do with the Bill before them, but may be, and quite often is, obstruction lifted from the floor of the House, or intended to prevent some other Bill coming before that Committee.

Nothing is so dangerous in a democracy as a safeguard which appears to be adequate but is really a façade.

ELLEN WILKINSON.

17th March, 1932.

FURTHER NOTE BY PROFESSOR LASKI.

With Miss Wilkinson's emphasis upon the desirability of delegated legislation as the only way to grapple with the functions now performed by modern governments I am in complete agreement. I think its problems call for a thorough revision of existing parliamentary procedure which was mainly devised for a quite different kind of state. As this is outside our terms of reference, however, and is in itself a separate theme of great importance, I content myself with limiting my agreement here to the general drift of Miss Wilkinson's argument as distinct from her specific suggestions.

HAROLD J. LASKI.

17th March, 1932.

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